86 1855

No. ___

FILED
MAY 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DELTA AIR LINES, INC., and WESTERN AIR LINES, INC.,
Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

WILLIAM J. KILBERG
Counsel of Record
SCOTT A. KRUSE
H. JOSEPH GORE
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

JAMES W. CALLISON
ROBERT S. HARKEY
WALTER A. BRILL
Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta Int'l Airport
Atlanta, Georgia 30320
(404) 765-2387

Counsel for Petitioners

JEFFERSON D. KIRBY, III
MICHAEL H. CAMPBELL
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N. E.
Atlanta, Georgia 30309
(404) 888-3800

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction to order arbitration of a contractual grievance that raises issues of employee representation which, under the Railway Labor Act, are within the exclusive jurisdiction of the National Mediation Board.

2. Whether, under the Railway Labor Act, a grievance which seeks enforcement of a successor clause in a union contract so as to require a merged airline to recognize the union as the representative of a minority group of employees after a merger raises representation issues within the exclusive jurisdiction of the National Mediation Board.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit appear in the caption of the case in this Court, including Western Air Lines, Inc. It should be noted, however, that Western Air Lines, Inc. ceased to exist when it was merged into Delta Air Lines, Inc. on April 1, 1987.[1]

---

[1] Pursuant to Supreme Court Rule 28, the following is a listing of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Delta Air Lines, Inc.: Atlantic Southeast Airlines, Inc.; Comair, Inc.; and Gatwick Handling, Ltd.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
PETITION	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
I. The Relevant Facts	2
II. The Proceedings Below	5
III. The Proceedings Before This Court	7
REASONS FOR GRANTING THE WRIT	8
I. The Decision Below Creates A Conflict Among The Courts Of Appeals Regarding The Proper Scope Of Jurisdiction Of The Federal Courts In Representation Disputes Under The Railway Labor Act	8
A. The NMB Has Exclusive Jurisdiction Of All Employee Representation Issues Under The Railway Labor Act And Every Other Court Of Appeals That Has Ruled On The Issue Has Concluded That The Courts Do Not Have Jurisdiction In Cases That Raise Questions Of Representation, Regardless Of The Context In Which They Arise	8
B. The Ninth Circuit's Decision In The Instant Case Conflicts With Every Other Appellate Decision Regarding The Effect Of Collective Bargaining Agreements On Employee Representation Issues In Airline Mergers	12

C. The Ninth Circuit Relied Upon Inapposite Authority To Reach Its Erroneous Decision 18

II. The Decision Below Directly Conflicts With The Railway Labor Act And The Statutory Authority Of The National Mediation Board 21

III. This Case Presents Issues Of National Policy Critical To The Vital Air And Rail Transportation Industries 24

CONCLUSION 26

APPENDICES A-1

A. Opinion of the Ninth Circuit, *IBTCWHA, Local Union No. 2702 v. Western Air Lines, Inc., et al.*, 813 F.2d 1359 (9th Cir. April 1, 1987) A-1

B. Order of the Ninth Circuit, *IBTCWHA, Local Union No. 2702 v. Western Air Lines, Inc., et al.*, Nos. 87-5657/5667 (9th Cir. March 31, 1987) B-1

C. Interim Order of the Ninth Circuit, *IBTCWHA, Local Union No. 2702 v. Western Air Lines, Inc., et al.*, No. 87-5657 (9th Cir. March 17, 1987) C-1

D. Interim Order of the Ninth Circuit, *Air Transport Employees v. Western Air Lines, Inc.*, No. 87-5667 (9th Cir. March 17, 1987) D-1

E. Opinion in *International Brotherhood of Teamsters, et al. v. Western Air Lines, Inc., et al.*, No. CV 86-7921 JMI (Px) (C.D. Cal. February 13, 1987) E-1

F. Opinion in *Air Transport Employees v. Western Air Lines, Inc.*, No. CV 86-8032 JMI (Bx) (C.D. Cal. February 13, 1987) F-1

G. Order of Circuit Justice Sandra Day O'Connor in *Western Air Lines, Inc., et al. v. IBTCWHA, Local Union No. 2702, et al.*, No. A-716 (April 1, 1987) G-1

H. Amended Order of Circuit Justice Sandra Day O'Connor in *Western Air Lines, Inc., et al. v. International Brotherhood of Teamsters and Air Transport Employees*, No. A-716 (April 2, 1987) H-1

I. Opinion of Circuit Justice Sandra Day O'Connor in *Western Air Lines, Inc. and Delta Air Lines, Inc. v. International Brotherhood of Teamsters and Air Transport Employees*, No. A-716 (April 2, 1987) I-1

J. Order in *Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc.*, No. 87-7040 (D.C. Cir. March 31, 1987) J-1

K. Memorandum Opinion and Order in *Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc.*, No. 87-0040 (D. D.C. February 20, 1987) K-1

L. Opinion in *International Brotherhood of Teamsters, Airline Division, et al. v. Pacific Southwest Airlines, et al.*, No. C-87-0402 MHP (N.D. Cal. March 20, 1987) L-1

M. Railway Labor Act, §§ 2, Fourth; 2, Ninth; 201; 45 U.S.C. §§ 152, Fourth; 152, Ninth; 181 ..... M-1

TABLE OF AUTHORITIES

CASES:	Page
Aircraft Mechanics Fraternal Association v. United Airlines, Inc., 406 F. Supp. 492 (N.D. Cal. 1976)	19
Air Line Employees Association v. Republic Airlines, Inc., 798 F.2d 967 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 458 (1986)	11,12,13,14
Air Line Pilots Association v. Texas International Airlines, Inc., 656 F.2d 16 (2d Cir. 1981)	11,14
Allegheny-Mohawk Merger Case, 59 C.A.B. 22 (1971)	5
Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc., No. 87-0040 (D. D.C. February 20, 1987)	17
Association of Flight Attendants, AFL-CIO v. Western Air Lines, Inc., No. 87-7040 (D.C. Cir. March 31, 1987)	25
Brotherhood of Railway and Steamship Clerks v. United Air Lines, Inc., 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964)	11,16
Brotherhood of Railway and Steamship Clerks v. Non-Contract Employees, 380 U.S. 650 (1965)	23
Carpenters' Local Union No. 1478 v. Stevens, 743 F.2d 1271 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985)	20
Division No. 14, Order of Railway Telegraphers v. Leighty, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962)	11
Flight Engineers International Association v. Eastern Air Lines, Inc., 359 F.2d 303 (2d Cir. 1966)	11
Flight Engineers International Association v. Eastern Air Lines, Inc., 311 F.2d 745 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963)	11

Table of Authorities Continued

	Page
General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad, 320 U.S. 323 (1943)	9
General Committee of Adjustment v. Southern Pacific Co., 320 U.S. 338 (1943)	9,19
International Association of Machinists v. Northeast Airlines, Inc., 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976)	11,16,19
International Brotherhood of Teamsters, Airline Division, v. Pacific Southwest Airlines, et al., No. C87-0402 MHP (N.D. Cal. March 20, 1987)	18
International Brotherhood of Teamsters v. Texas International Airlines, Inc., 717 F.2d 157 (5th Cir. 1983)	11,14,15,22
Local Lodge No. 1266 v. Panoramic Corp., 668 F.2d 176 (7th Cir. 1981)	18
New York Central Railroad Co., 1 N.M.B. 197 (1941)	21
Northwest Airlines, Inc., 13 N.M.B. 399 (1986)	10,22
Pennsylvania Railroad Co., 1 N.M.B. 23 (1937)	9
Railway Express Agency, 4 N.M.B. 227 (1964)	21
Republic Airlines, Inc., 8 N.M.B. 49 (1980)	10,22
Ruby v. American Airlines, Inc., 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964)	18,19
Seaboard Coast Line Railroad Co., 6 N.M.B. 63 (1976)	21
Summit Airlines v. Teamsters, 628 F.2d 787 (2d Cir. 1980)	14
Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943)	9
Trans World Airlines, Inc./Ozark Airlines, 14 N.M.B. 218 (April 10, 1987)	10,22,23

Table of Authorities Continued

	Page
STATUTES:	
29 U.S.C. § 159(b), National Labor Relations Act § 9(b)	20
45 U.S.C. § 152 Fourth, Railway Labor Act § 2 Fourth	2,9,21
45 U.S.C. § 152 Ninth, Railway Labor Act § 2 Ninth	2,9,23
45 U.S.C. § 156, Railway Labor Act § 6	8
45 U.S.C. § 181, Railway Labor Act § 201	2,8
45 U.S.C. § 184, Railway Labor Act § 204	8
Airline Deregulation Act of 1978, Public L. No. 95-504, 92 Stat. 1705 (1978) (amending Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1982)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. -__

DELTA AIR LINES, INC., and WESTERN AIR LINES, INC.,
Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, AIRLINE DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Delta Air Lines, Inc., respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the proceedings below on April 1, 1987.

OPINIONS BELOW

A copy of the opinion of the Ninth Circuit Court of Appeals, entered on April 1, 1987, which is reported at 813 F.2d 1359, is attached hereto as Appendix A. A copy of the circuit court's preliminary order of March 31, 1987, is attached hereto as Appendix B.

The opinion and judgment of the court of appeals reversed the judgments of the United States District Court for the Central District of California in two cases that were consolidated on appeal. Copies of the orders of the district court, which are unreported, are attached hereto as Appendices E and F.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit was rendered in this case on April 1, 1987. This Petition for a Writ of Certiorari is filed within ninety days of that date, as required by 28 U.S.C. § 2101(c) and Rule 20.2 of the Supreme Court Rules. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The statute involved in this case is the Railway Labor Act, 45 U.S.C. §§ 151-188, and in particular §§ 152, Fourth and Ninth, and 181, copies of which are set forth in Appendix M.

STATEMENT OF THE CASE

I. The Relevant Facts

This case arises from actions filed by two labor unions, the Air Transport Employees ("ATE") and

the International Brotherhood of Teamsters and two of its locals ("IBT"), the collective bargaining representatives for some of the employees of Western Air Lines, Inc. ("Western") prior to the merger of Western into Delta Air Lines, Inc. ("Delta") on April 1, 1987. In those actions the unions sought to compel arbitration of grievances under their labor agreements with Western, alleging the breach of successor clauses in connection with the then-proposed merger of Western into Delta. The unions alleged that Western violated those clauses by failing to secure Delta's agreement to be bound by the unions' contracts after the merger was completed. Western refused to arbitrate these grievances on the grounds that they raised employee representation issues within the exclusive jurisdiction of the National Mediation Board ("NMB").

The unions were certified by the NMB as the bargaining representative for various crafts or classes of Western employees. The ATE represented the office, clerical, fleet and passenger service craft or class at Western, and the IBT represented the Western employees in separate crafts or classes consisting of mechanics and related employees, stock clerks and flight instructors. Both unions had successor provisions in their collective bargaining agreements with Western which the unions contended required Western to bind Delta to those labor agreements.

In most of the recognized crafts or classes represented by the unions, Delta had approximately three times as many employees as Western. Those Delta employees have opted to have no collective bargaining representative. Thus, after the merger, a large majority (approximately 75%) of most crafts or classes would be (and ultimately was) made up of original

Delta employees who have never chosen to be represented by a labor union.

On September 9, 1986, Western and Delta entered into an Agreement and Plan of Merger ("Merger Agreement") providing for the acquisition of Western by Delta. The transaction was approved by the Department of Transportation ("DOT") on December 11, 1986 and by the shareholders of the two companies on December 16, 1986. The first step toward the merger, the transfer of the Western stock to Delta, occurred on December 18, 1986. After that initial step, Western was a wholly-owned subsidiary of Delta which existed as a separate corporation and was operated as a separate carrier. The second and final step was the legal merger of Western into Delta on April 1, 1987, at which time operations were combined, and Western ceased to exist.

In the Merger Agreement, the parties agreed that Western would honor its collective bargaining agreements as long as it continued operating as a separate carrier. Delta assured all Western employees that they would be employed by Western after the acquisition and that they were likely to be offered positions by Delta after the April 1 merger. Later, Delta did offer post-merger jobs to all Western permanent non-officer employees. Since the wages paid by Delta were significantly higher than those earned by Western employees in each of the affected crafts or classes, Delta gave substantial pay increases to most Western employees after the merger.

In the Merger Agreement, Delta also agreed to provide Western employees with labor protective provisions ("LPP's") at least as favorable as the standard LPP's imposed by the Civil Aeronautics Board

("CAB") in the *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1971). The LPP's require continuation of certain fringe benefits, displacement and dismissal allowances for employees losing their jobs or taking lesser-paying jobs, payment of moving and related costs for employees required to move, integration of seniority lists in a fair and equitable manner and establishment of a binding arbitration procedure for any dispute pertaining to the LPP's. Delta was the first carrier voluntarily to agree to be bound by those provisions in a merger since the DOT (which succeeded to the CAB's jurisdiction over airline mergers under the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1542 (1982)), ceased imposing LPP's following deregulation of the airline industry.

II. The Proceedings Below

In separate actions commenced in the United States District Court for the Central District of California, the unions sought orders compelling Western to arbitrate their claims that Western was required to bind Delta to the unions' collective bargaining agreements. The district court found that the issues raised by these arbitration claims involved representation and were exclusively committed, under the Railway Labor Act, to the jurisdiction of the NMB. Accordingly, the district court held that it lacked subject matter jurisdiction over the unions' actions and dismissed them. (App. E-1, F-1) Subsequently, the unions appealed and the ATE filed a motion for an order compelling arbitration pending appeal. The IBT moved for an expedited appeal but did not seek a similar arbitration order.

On March 17, 1987, the Court of Appeals for the Ninth Circuit granted the ATE's request for an injunction compelling arbitration pending appeal, construed the IBT motion for expedited appeal as a motion for an order compelling arbitration pending appeal and, as construed, granted the IBT motion. (App. C-1, D-1) Delta and Western sought reconsideration and moved the circuit court to expedite and decide the cases before the long-planned merger was to be consummated on April 1. The circuit court granted the motion for expedited appeal and set oral argument for March 30. The unions then moved the circuit court to enjoin the merger. In papers filed with the circuit court and at the oral argument Delta and Western pointed out the staggering hardships to the two companies, their employees and the public that would result from any such last-minute injunction which might delay the merger, including the fact that the Federal Aviation Administration had indicated that it might find it necessary to close down the Western operation because of its concern that Western could not continue to operate independently after April 1.

On March 31, 1987, at approximately 8:00 P.M., Eastern Standard Time, the Ninth Circuit issued an order which, among other things, reversed the district court, ordered arbitration of the grievances, and enjoined the Delta-Western merger, which was to be completed the following morning. (App. B-1) On April 1, 1987, the Ninth Circuit issued its opinion setting forth the reasons for its order. (App. A-1) Despite the unions' claims that Western was required to bind Delta to the unions' collective bargaining agreements, the circuit court did not view the unions'

claims as raising representation issues involving Delta. 813 F.2d at 1362. Rather, relying on authority under the National Labor Relations Act, which does not apply to the airline industry, the circuit court held that the unions' claims were matters for arbitration and not within the exclusive jurisdiction of the NMB. *Id.* at 1363. The circuit court did so while expressly declining to decide whether an arbitrator could validly order representation by a union. *Id.*

III. The Proceedings Before This Court

In view of the irreparable harm faced by Delta and Western, their employees and the traveling public as a result of the eleventh-hour injunction granted by the Ninth Circuit, an emergency application for stay of the Ninth Circuit's order and for vacation of its injunction was filed with the Honorable Sandra Day O'Connor, the Circuit Justice for the Ninth Circuit. On April 1, 1987, at approximately 2:15 A.M., Justice O'Connor granted the stay, which will terminate automatically if certiorari is denied. (App. G-1)

On April 2, 1987, Justice O'Connor issued a written opinion (App. I-1), noting that the reasoning of every other court of appeals that had ruled on the issues presented in this case created grave doubt concerning the validity of the Ninth Circuit's decision. As the great weight of the caselaw favored the position of Delta and Western, Justice O'Connor found that:

> The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely that at least four Justices would vote to grant certiorari, and that the applicant is likely to prevail on the merits.

Slip. op. at 6 (App. I-6).

The unions thereafter each filed motions to vacate the stay issued by Justice O'Connor. The full Court, with Justice Stevens not participating, denied the unions' motions on April 6, 1987.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE PROPER SCOPE OF JURISDICTION OF THE FEDERAL COURTS IN REPRESENTATION DISPUTES UNDER THE RAILWAY LABOR ACT

A. The NMB Has Exclusive Jurisdiction Of All Employee Representation Issues Under The Railway Labor Act And Every Other Court Of Appeals That Has Ruled On The Issue Has Concluded That The Courts Do Not Have Jurisdiction In Cases That Raise Questions Of Representation, Regardless Of The Context In Which They Arise

The Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-163, regulates labor relations of the nation's railroads and, through Title II, 45 U.S.C. §§ 181-188, air carriers. The RLA defines three classes of labor disputes and establishes a different dispute resolution mechanism for each. "Minor" disputes are those which arise in connection with the application or interpretation of collective bargaining agreements. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U.S.C. § 184. "Major" disputes involve the formation of collective bargaining agreements. 45 U.S.C. §§ 156, 181. "Representation" disputes involve the determination of appropriate "crafts or classes" of employees for collective bargaining purposes and the selection of collective bargaining rep-

resentatives. 45 U.S.C. §§ 152, Fourth and Ninth, 181.

Employee representatives under the RLA are chosen by the majority of any craft or class, 45 U.S.C. § 152, Fourth. The NMB has exclusive jurisdiction of all disputes regarding employee representation, 45 U.S.C. § 152, Ninth. *See General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338 (1943); *General Committee of Adjustment v. Missouri-Kansas-Texas Railroad Co.*, 320 U.S. 323 (1943); *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943).

The RLA contemplates that employees will be represented through systemwide crafts or classes of employees and that the majority of the employees in each craft or class may select a bargaining representative. The NMB has held on numerous occasions that it has no authority to split a craft or class or fragment a carrier's labor force:

> The Railway Labor Act does not authorize the National Mediation Board to certify representatives for small groups of employees arbitrarily selected. Representatives may be designated and authorized only for the *whole* of a craft or class employed by a carrier.

Pennsylvania Railroad Co., 1 N.M.B. 23, 24 (1937) (emphasis in original).

Applying this principle, the NMB has specifically held that upon the merger of two airlines, the representation certifications of unions of the acquired airline, whose employees will represent only a minority of the combined employee groups after the merger, are extinguished by operation of law at the

time of the merger. *See Northwest Airlines Inc.*, 13 N.M.B. 399 (1986); *Republic Airlines, Inc.*, 8 N.M.B. 49 (1980). More recently, in *Trans World Airlines/ Ozark Airlines*, 14 N.M.B. 218 (April 10, 1987), the NMB reaffirmed these principles, but indicated that representation certifications are not formally extinguished as a result of a merger until the NMB so rules.

The unions have attempted to evade the NMB's jurisdiction to address these representation questions in the instant merger by contending that they are merely seeking to arbitrate contractual grievances which do not affect representation. They claim that the successor provisions contained in their collective bargaining agreements required Western to extract promises from Delta to recognize the unions as the bargaining representatives and to honor their contracts after the completion of the merger. Any arbitration proceeding concerning such issues would by its very nature require resolution of the unions' post-merger representation rights, thereby usurping the NMB's exclusive authority over such matters. Regardless of the context in which such issues arise, or the relief sought, neither the courts nor labor arbitrators have jurisdiction over these issues. For the unions to be entitled to any relief, an arbitrator would have to determine that Western should have required Delta to assume the unions' contracts. The arbitrator thereby would step into the representational area exclusively reserved to the NMB.

Prior to this case, an unbroken line of appellate decisions established that the courts must look beyond the superficial form of a complaint to determine whether, as here, it masks an underlying represen-

tation dispute. Regardless of the context, if representation issues are involved, the courts are required to dismiss the complaint for lack of jurisdiction. *See, e.g., Air Line Employees Association v. Republic Airlines Inc.*, 798 F.2d 967, 968 (7th Cir.) (per curiam), *cert. denied*, ___ U.S. ___, 107 S. Ct. 458 (1986) (pre-merger action for expedited arbitration of grievance); *International Brotherhood of Teamsters v. Texas International Airlines Inc.*, 717 F.2d 157, 158 (5th Cir. 1983) (seeking declaration that union's contract survived a merger); *Air Line Pilots Association v. Texas International Airlines Inc.*, 656 F.2d 16, 19 (2d Cir. 1981) (action to enforce contract on carrier's subsidiary); *International Association of Machinists v. Northeast Airlines Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) (seeking negotiation of employees' post-merger rights); *Flight Engineers International Association v. Eastern Air Lines Inc.*, 359 F.2d 303, 307 (2d Cir. 1966) (seeking reinstatement of replaced striking employees); *Brotherhood of Railway and Steamship Clerks v. United Air Lines Inc.*, 325 F.2d 576, 579 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964) (seeking declaration that union's contract survived a merger); *Flight Engineers International Association v. Eastern Air Lines Inc.*, 311 F.2d 745, 746 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963) (seeking injunction requiring airline to bargain); *Division No. 14, Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962) (seeking to enjoin agreement between railroad and parent union).

B. The Ninth Circuit's Decision In The Instant Case Conflicts With Every Other Appellate Decision Regarding The Effect Of Collective Bargaining Agreements On Employee Representation Issues In Airline Mergers

As Justice O'Connor stated in her April 2, 1987 written opinion:

> The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the caselaw supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board.

Slip op. at 4 (App. I-4, 5). The Courts of Appeals of four circuits, the First, Fifth, Sixth and Seventh, have specifically ruled that the courts have no jurisdiction in actions to enforce union contracts in connection with airline mergers because such actions inevitably raise representation questions.

The Seventh Circuit's recent decision in *Air Line Employees Association v. Republic Airlines Inc.*, 798 F.2d 967 (7th Cir.) (per curiam), *cert. denied*, ___ U.S. ___, 107 S. Ct. 458 (1986) ("*ALEA v. Republic*"), is especially instructive as its facts are indistinguishable from those here. In anticipation of a merger with Republic Airlines, Northwest Airlines agreed in advance to recognize two of its own unions as representatives of the combined workforce after the merger was to take place. Before this "transition agreement" became effective, one of Republic's unions, the Air

Line Employees Association ("ALEA"), brought an action against Republic and Northwest challenging the transition agreement as a breach of ALEA's labor contract with Republic. Like the unions' suits here, ALEA's suit reached the Seventh Circuit *prior* to the merger. 798 F.2d at 967. Further, Count 3 of ALEA's complaint sought the same relief the unions seek here, "an order compelling expedited arbitration of its grievance challenging defendants' contract violations and preserving the *status quo* pending issuance of the arbitrator's decision." *Id.* at 968.

Thus, the Seventh Circuit had before it all of the elements of the case here at the time of the Ninth Circuit's decision, *i.e.*, a *premerger* contract action against the *premerger* carrier while the labor agreement was still in effect. Nevertheless, unlike the Ninth Circuit, the Seventh Circuit affirmed the dismissal of ALEA's complaint for lack of jurisdiction:

> [T]he district judge's decision was in conformity with—as he put it—'*the overwhelming and well-developed case law* addressing issues similar to those presented in the instant complaint.' . . . [W]e find no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits. . . . *[E]ven though the complaint was couched in terms of enforcing the collective bargaining agreement, the dispute was basically a representational dispute and therefore committed to the sole jurisdiction of the NMB* . . . .

Id. (footnote and citation omitted, emphasis added).[1]

---

[1] The Ninth Circuit incorrectly attempted to distinguish *ALEA v. Republic* as "a dispute between two unions concerning post-

To the same effect is the Fifth Circuit's decision in *International Brotherhood of Teamsters v. Texas International Airlines Inc.*, 717 F.2d 157 (5th Cir. 1983). After Texas International merged with the larger Continental Air Lines, Texas International's 1,800 Teamsters found themselves subsumed in an unorganized unit of 4,000 Continental employees, and Continental refused to recognize the Teamsters or their premerger agreement. Although the Teamsters' declaratory action, like the unions' suits here, purported only to seek enforcement of the union's contract, the Fifth Circuit nevertheless held that the action for contract enforcement hinged on the underlying representation dispute. *Id.* at 161. The court found as a consequence that it had no jurisdiction to intervene:

---

merger representation" and "essentially . . . an attempt to secure a court order deciding which union should represent employees after the merger." 813 F.2d at 1363 (App. A-8). The Seventh Circuit dismissed ALEA's claim seeking premerger arbitration of its grievance, as well as its other claims for court relief. 798 F.2d at 968. The representational nature of the dispute was not affected by the form of relief sought. Moreover, it does not matter whether a representation dispute is between two unions, as in *ALEA v. Republic*, or between minority unions and an unrepresented majority of employees, as here. A representation dispute is triggered by the claim of even a single union to representative status. *International Brotherhood of Teamsters v. Texas International Airlines Inc.*, 717 F.2d 157, 163 (5th Cir. 1983); *Air Line Pilots Association v. Texas International Airlines Inc.*, 656 F.2d 16, 24 (2d Cir. 1981) ("[E]ven in the absence of a challenge by a competing union or an application to the NMB, the court is bound to dismiss the action"). *Summit Airlines v. Teamsters*, 628 F.2d 787, 793 n.3 (2d Cir. 1980) (Representation dispute exists "even though only one union seeks representation if some employees are indifferent or hostile to being represented").

> Enforcement of the contract, therefore, inescapably entailed the continuance of the Union's role as employee representative for the minority group, in accordance with its 1980 certification. Continuation of the contract in force unavoidably constitutes a determination of employee representation, and the conjunction of the two issues creates a conflict in principles, one dictated by the express statutory provision giving the Board sole jurisdiction over representation matters and the other implicit from the limited scope of the statute, that other disputes are reserved for judicial resolution.

Id. The court continued:

> Given the Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements.

Id. at 164.

The same principles apply here. The Ninth Circuit's order compelling arbitration and staying the merger assumes jurisdiction over a representation dispute involving recognition of the unions and their labor agreements after the merger of Delta and Western. The Ninth Circuit decision also erroneously would allow an arbitrator to decide questions of representation within the NMB's exclusive jurisdiction. These actions simply cannot be reconciled with the Fifth and Seventh Circuit decisions or with the RLA.

Indeed, since *Brotherhood of Railway and Steamship Clerks v. United Air Lines Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964), was decided, the courts have recognized that placing a representation issue in the form of a contract dispute cannot oust the NMB of its exclusive jurisdiction. In that case the premerger contract of United's merger partner (Capital Airlines) with the Railway Clerks contained an express successor clause which the union sought to enforce. The Sixth Circuit affirmed dismissal for lack of jurisdiction saying:

> [A]lthough the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction 'where "validity" of the contract depends upon the merits of a representation dispute.'

325 F.2d at 579 (citation omitted).

The First Circuit reached a similar conclusion, citing the *United* case. In *International Association of Machinists v. Northeast Airlines Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976), the court found no jurisdiction to order the post-merger employer to bargain with the pre-merger union, saying:

> At the very least, the merger created real doubts about whether plaintiffs represent the majority of any Delta craft or class of employees, and where there is such doubt, federal courts leave resolution of the dispute to the National Mediation Board.

536 F.2d at 977.

In addition, a number of district courts have reached the same conclusion in recent cases. Apart from the two cases decided below, two other district courts recently have decided this same issue in accord with the appellate cases cited above and have dismissed the union actions on jurisdictional grounds. In both cases, as here, the union's action to compel arbitration of a grievance was brought *prior* to the merger against the *premerger* carrier while the union's labor agreement was still in effect. In *Association of Flight Attendants v. Western Air Lines, Inc.*, No. 87-0040 (D.D.C. Feb. 20, 1987) (App. K-1), which also arises out of the Delta-Western merger and raises the same issues raised here, Judge Gesell said:

> Where both representational issues and 'minor' disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat the purposes of the RLA. This is particularly true in merger situations where representational issues inevitably arise and it is 'impossible to look only to the existence of a collective bargaining agreement and to isolate it from the other operational and representational matters.'

Slip. op. at 5-6 (footnote and citation omitted) (App. K-5).

In *International Brotherhood of Teamsters, Airline Division v. Pacific Southwest Airlines, et al.*, No. C-87-0402 MHP (N.D. Cal. Mar. 20, 1987) (App. L-1), Judge Patel said:

> Since the disputed terms arise in the context of contractual language prospectively obliging PSA to assure the inclusion of certain terms in any subsequent merger agreement, the provisions do not purport to directly govern the post-merger employment and representation of any employee. Nonetheless, courts have consistently held that such terms effectively deny the National Mediation Board's sole jurisdiction over representation matters.

Slip op. at 9 (footnote omitted) (App. L-8).

C. The Ninth Circuit Relied Upon Inapposite Authority To Reach Its Erroneous Decision

The Ninth Circuit relied primarily on *Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981), a decision not under the RLA, but under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169. 813 F.2d at 1363 (App. A-8). The Ninth Circuit erroneously assumed that the two Acts impose the same requirements in representation matters. The law, however, is to the contrary.

Judge Friendly in *Ruby v. American Airlines, Inc.*, 323 F.2d 248 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964), highlighted the differences between the two statutes in representation disputes. The Second Circuit held it had no jurisdiction under the RLA to intervene in a representation dispute between two unions and expressly rejected one union's argument

that it should apply the allegedly contrary principles of the NLRA:

> [T]he claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed. . . . For the courts to require the Mediation Board to transform itself into an adjudicative and prosecutorial agency like the N.L.R.B. or to impose themselves upon it would distort the entire Congressional scheme.

323 F.2d at 256 (footnote and citations omitted). *Accord International Association of Machinists v. Northeast Airlines Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976) (RLA obligations are *not* the same as NLRA obligations where a merger raises doubts about union's majority status in the post-merger class or craft). *See also General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338, 342-43 (1943) (Court could not, by analogy to the NLRA, determine which union should represent employees in certain types of grievances); *Aircraft Mechanics Fraternal Association v. United Airlines*, 406 F. Supp. 492, 508 (N.D. Cal. 1976) ("We do not feel compelled to expand, indeed we feel prohibited from expanding, the limited scope of [judicial] jurisdiction existing under the Railway Labor Act by analogy to the National Labor Relations Act under which the scope of [judicial] jurisdiction is much greater").

As all these courts have recognized, the RLA and NLRA impose very different obligations upon the par-

ties. The NMB's sweeping exclusive jurisdiction over representation disputes under the RLA and the RLA's requirement of a single carrier-wide representative for each craft or class have no counterparts under the NLRA. By contrast under the NLRA, the National Labor Relations Board ("NLRB") has primary, but not exclusive, jurisdiction over representation issues, *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1278-79 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985), and the NLRB may certify an "employer unit, craft unit, plant unit or subdivision thereof." 29 U.S.C. § 159(b).

These differences are critical. In the NLRA context it is possible for a court to order arbitration of a successor grievance because (1) the NLRB's exclusive jurisdiction would not be usurped, and (2) there are no systemwide crafts or classes that might be fragmented by an arbitrator's decision. The Ninth Circuit's failure to recognize these differences led to its anomalous decision which is at odds with the decisions of the other circuits discussed above.

By ignoring the previously uniform decisions of the other circuits, the Ninth Circuit not only asserted jurisdiction over a matter within the exclusive domain of the NMB, but it also improperly would allow an arbitrator to decide representation issues. Its decision creates a direct, irreconcilable conflict among the circuits regarding the jurisdiction of the courts, of the NMB and of arbitrators in connection with representation disputes arising under the RLA, and this Court must resolve that conflict.

II. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RAILWAY LABOR ACT AND THE STATUTORY AUTHORITY OF THE NATIONAL MEDIATION BOARD

The RLA provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." 45 U.S.C. § 152, Fourth. In exercising its statutory authority to resolve representation disputes under the RLA, the NMB has determined that it cannot designate less than a carrier-wide craft or class of employees for purposes of collective bargaining representation. As the NMB explained in *New York Central Railroad Co.*, 1 N.M.B. 197, 209-10 (1941), single representation for a craft or class on a carrier-wide basis was mandated by Congress, and splitting a craft or class contravenes the legislative directive. *See also Seaboard Coast Line Railroad Co.*, 6 N.M.B. 63, 64-65 (1976); *Railway Express Agency,* 4 N.M.B. 227, 231 (1964). Yet the fragmenting of the post-merger crafts or classes is precisely what the Ninth Circuit's decision would allow by compelling arbitration of the unions' claims that Western must bind Delta to recognize the unions and their contracts for the minority groups of former Western employees after the merger.

The NMB has consistently refused to fragment crafts or classes in exercising its jurisdiction in airline merger cases because of its RLA mandate to preserve employee relations stability in the vital transportation industries. *Railway Express Agency*, 4 N.M.B. 227, 231 (1964). It has also recognized that such fragmentation would preclude effective integration of a combined carrier's post-merger operations into a sin-

gle transportation system. *Republic Airlines Inc.*, 8 N.M.B. 49, 54-55 (1980). Effective integration of a post-merger labor force is impossible where some employees are represented by a union, while others, performing the same job alongside union members, are not. Different work rules and terms and conditions of employment would apply to employees doing the same jobs at the same locations, and the inefficiencies of such an operation would be totally inconsistent with the original purpose of the merger. *See International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983).

Where a smaller airline is merged into a larger one, the NMB determines whether the two carriers become one carrier and, therefore, whether the certifications of the smaller carrier's collective bargaining representatives survive the merger. *Republic Airlines, Inc.*, 8 N.M.B. 49, 56 (1980). Under the NMB's procedures, each craft or class can be represented, if at all, on a systemwide basis only, and a merger of air carriers resulting in a single transportation system has the effect of terminating any certification of a representative of less than a majority of the employees in a combined craft or class. *Northwest Airlines, Inc.*, 13 N.M.B. 399 (1986). *See also International Brotherhood of Teamsters v. Texas International, Inc.*, 717 F.2d 157, 163 (5th Cir. 1983) (recognizing NMB rules regarding extinguishing of certification of bargaining representative upon merger of air carriers).

In its recent decision in *Trans World Airlines/Ozark Airlines*, 14 N.M.B. 218 (April 10, 1987), the NMB ruled that the degree of integration of the operations of two carriers into a single transportation system determines whether the certifications of minority rep-

resentatives are terminated. *Id.* at 236. The NMB also said that in view of the increasing number of mergers under deregulation it intends to develop and implement more definitive guidelines in the near future. *Id.* at 241. Thus, the NMB has demonstrated its intent, ability, and flexibility to address and resolve any and all representation disputes arising from airline mergers.

Furthermore, prior to the April 10, 1987 NMB decision in *TWA*, *supra*, a union could invoke the § 152, Ninth services of the NMB, which includes procedures for employee voting with respect to a representation dispute, but a carrier could not. *Brotherhood of Railway and Steamship Clerks v. Non-Contract Employees*, 380 U.S. 650 (1965). Neither the ATE nor the IBT chose to do so in the instant case, and Western and Delta could not. However, in *TWA*, *supra* at 241-42, the NMB stated, for the first time, that "carriers involved in a merger, acquisition or consolidation will be permitted to invoke the Board's services for determination of whether any NMB certifications have terminated." Subsequently, on April 20, 1987, Delta invoked the NMB's services in this case. The NMB has accepted Delta's invocation of its services and has asked Delta and the unions for certain information to make its determination. Thus, the NMB has asserted and is exercising its exclusive jurisdiction over these representation matters.

Instead of invoking the mandatory NMB processes, the unions sought judicial and arbitral relief. By permitting such forum shopping and endorsing the intervention of the federal courts and labor arbitrators in representation disputes, the decision of the Ninth Circuit directly conflicts with the purposes of the RLA

and usurps the exclusive statutory authority of the NMB to investigate and resolve such representational disputes. The Ninth Circuit decision permitting arbitration where representation issues are involved would also lead to fragmentation of the carrier-wide craft or class bargaining units provided for by the RLA. The exclusivity of the NMB's jurisdiction over representation issues was established to assure, through a single agency's determinations, national uniformity and adherence to the RLA representation principles. In order to preserve these principles, the Ninth Circuit's decision must be reviewed and reversed.

III. THIS CASE PRESENTS ISSUES OF NATIONAL POLICY CRITICAL TO THE VITAL AIR AND RAIL TRANSPORTATION INDUSTRIES

Airline mergers have become an increasingly frequent event in the transportation industry, impelled in large part by heightened competition resulting from airline deregulation. These mergers involve thousands of employees and hundreds of millions of dollars in assets. They affect transportation systems used by many millions of persons annually. Any disruption of this vital industry, such as that threatened by the Ninth Circuit's decision, is of national concern. Moreover, because the decision is under the RLA, it could lead to further incorrect decisions affecting the railroad industry.

The Ninth Circuit's decision cannot be viewed as merely an isolated, localized or technical construction of the law. Many airlines, such as Delta and Western, are vulnerable to suit in several circuits, including the Ninth Circuit, because of their extensive operations. Further, most union contracts in the airline industry

contain successor provisions, or other provisions that might be construed to empower arbitrators to decide representation issues, as the unions have construed their contracts here. The combination of these factors not only subjects merging airlines to the disruptions caused by the Ninth Circuit's invasion of the NMB's jurisdiction, but also potentially subjects them to conflicting requirements in different circuits with regard to the *same* merger.

The instant merger illustrates how those inconsistencies can arise. On the same day that the Ninth Circuit issued its decision compelling arbitration of the unions' grievances and enjoining the Delta-Western merger, the Court of Appeals for the District of Columbia Circuit *denied* a third union's motion to compel arbitration pending appeal, which was brought on a legal theory identical to those used by the ATE and IBT below. *Association of Flight Attendants v. Western Air Lines, Inc.*, No. 87-7040 (D.C. Cir. Mar. 31, 1987). (App. J-1)

That ruling indicates that the District of Columbia Circuit is likely to follow the other circuits which have concluded that the NMB has exclusive jurisdiction. Thus, unless the Ninth Circuit is reversed, Delta is presented with the real possibility that different results will be reached by the two courts of appeals in the same merger.

It was precisely to avoid such conflicts, and the resulting fragmentation of the carrier's labor force, that Congress vested exclusive jurisdiction over representation disputes in the NMB. Obviously, it is intolerable for the NMB's exclusive jurisdiction over representation disputes arising in airline and railroad mergers to be recognized in the District of Columbia,

First, Fifth, Sixth and Seventh Circuits, but not in the Ninth Circuit.

With so much at stake in the merger of air and rail carriers, the interests of the parties involved and those of the general public require that the issues raised here be definitely resolved, and that this previously settled area of labor law be put right again. The disruption caused by the Ninth Circuit's ruling in the instant merger alone is of national concern, but, even more broadly, the questions raised here are certain to arise again as pending and future mergers are consummated in the airline and railroad industries. It is therefore most important that the Court finally resolve these questions.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be granted to review the decision of the Ninth Circuit Court of Appeals. Indeed, in view of the clear error of the Ninth Circuit, Petitioner suggests that summary reversal of this case may be appropriate.

Respectfully submitted,

WILLIAM J. KILBERG
Counsel of Record
SCOTT A. KRUSE
H. JOSEPH GORE
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

JEFFERSON D. KIRBY, III
MICHAEL H. CAMPBELL
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N. E.
Atlanta, Georgia 30309
(404) 888-3800

JAMES W. CALLISON
ROBERT S. HARKEY
WALTER A. BRILL
Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta Int'l Airport
Atlanta, Georgia 30320
(404) 765-2387

Counsel for Petitioners

APPENDIX

APPENDIX A

FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 87-5657/5667

D.C. Nos.
CV-867-7921-JMI
CV-86-8032

FILED
APR 1 1987

IBTCWHA, LOCAL UNION NO. 2702,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC., *et al.*,
Defendants-Appellees

AIR TRANSPORT EMPLOYEES,
Plaintiff-Appellant,

v.

Western Air Lines, Inc.,
Defendant-Appellee.

OPINION

Appeal from the United States District Court
For the Central District of California
James M. Ideman, District Judge, Presiding
Argued and submitted March 30, 1987
San Francisco, California
Decided March 31, 1987
Opinion Filed: April 1, 1987

Before: GOODWIN, SCHROEDER, and POOLE, Circuit Judges.

PER CURIAM:

Plaintiffs-Appellants are the International Brotherhood of Teamsters (IBT) and Air Transport Employees (ATE), two unions which represent employees of Western Air Lines. They filed these actions, which we have consolidated on appeal, to require Western to arbitrate the unions' claims that Western's agreement to merge with Delta Air Lines violates collective bargaining agreements between Western and the unions.

The district court dismissed the actions because it viewed the disputes as representational disputes within the exclusive jurisdiction of the National Mediation Board (NMB or Board). *See* 45 U.S.C. § 152. The unions, on the other hand, characterize the disputes as concerning the proper interpretation of terms of collective bargaining agreements, including specifically bargained for provisions on mergers, and thus arbitrable as minor disputes under the Railway Labor Act (RLA). *See* 45 U.S.C. § 184. The unions point out that the Board lacks authority to enforce contracts, *see Chicago & N.W. Ry. v. United Transportation Union*, 402 U.S. 570 (1971).

We granted both unions' requests for injunctive relief pending appeal and ordered arbitration to proceed on an expedited basis. All parties have requested an expedited hearing of the merits of the appeal, and we have granted such expedited treatment so that the issue of the arbitrability of the dispute can be resolved before the scheduled merger of the two airlines on April 1, 1987. We hold that the disputes are arbitrable (minor) disputes under the RLA because they center on the applicability and interpretation of collective bargaining agreements. The arbitrations cannot be completed prior to the date of the scheduled merger of the two airlines, however, and if the merger is consummated as planned there will be no entity with whom

the unions may arbitrate. In order to preserve the status quo, *see Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 531 (1960), we order Western Air Lines to take appropriate steps to see that a valid award of the arbitrator may be enforced.

BACKGROUND

ATE is the certified representative of Western's clerical, office, fleet, and passenger service employees. IBT represents Western's mechanics, stock clerks, and flight instructors.

Western's collective bargaining agreement with ATE states that the agreement shall be binding on any successor of Western and that the successor shall continue to apply the terms of the agreement until the agreement is changed in accordance with the RLA. Western's agreement with IBT similarly provides that the collective bargaining agreements are binding on Western's successors and that, in case of consolidation or merger, Western and IBT shall meet to negotiate provisions for protection of Western employees.

On September 1, 1984, IBT and Western signed a letter of agreement stating that if Western were the object of an unfriendly takeover, it would require the acquiring airline to assume its collective bargaining agreement obligations to IBT. The letter further states that Western will be liable to IBT and Western's employees for damages if Western fails to obtain such agreement from the acquiring airline.

A second letter of agreement between IBT and Western, dated September 14, 1984, states that Western will not agree to a merger unless the acquiring airline agrees that Western's maintenance facilities will be operated separately from those of the acquiring airline, unless IBT agrees to integration of Western's mechanics with those of the purchasing company. The letter further stipulates that after

a merger all work performed by Western employees represented by IBT would continue to be assigned to those employees, and that work would continue to be recognized as within IBT's jurisdiction and covered by the IBT-Western collective bargaining agreements. Similar understandings with respect to merger were negotiated with ATE.

These merger provisions between IBT and ATE and Western were agreed to as part of extensive negotiations which included wage concessions of ten percent for IBT-represented employees and ten to twenty percent by ATE-represented employees.

On September 9, 1986, Delta, its subsidiary DL Acquisition Corp., and Western entered into an agreement to merge Western into Delta. The United States Department of Transportation approved the merger and Delta acquired Western's shares on December 16, 1986. Delta's acquisition of Western stock constituted the first phase of the merger. The second phase is scheduled to occur on April 1, 1987, when Delta will combine operations of the two airlines. Western will cease to exist as a separate corporate entity on that date. The merger agreement between Western and Delta does not provide that Delta will recognize the unions or be bound by the Western-ATE/IBT collective bargaining agreements after April 1. It apparently makes no mention of Western's agreements with the unions regarding merger. Delta employees within the crafts covered by these collective bargaining agreements are not represented by any union.

Both unions filed grievances regarding Western's alleged failure to comply with the collective bargaining agreements. Both unions alleged that the collective bargaining agreements were breached by Western's agreement to merge. Western responded that the clauses and letters of agreement were inapplicable to the merger. Both unions then requested arbitration of whether there had been a breach by the merger agreement. Western refused

to submit to arbitration of these issues on the ground that they might result in the arbitration deciding who would properly represent Delta employees after the merger. Western argued that because these issues involve the unions' representation status, they are not arbitrable, but instead are subject to the exclusive jurisdiction of the NMB.

Both unions then filed actions in the district court for injunctions to compel arbitration. On February 17, 1987, the district court considered both cases simultaneously and dismissed both actions for lack of jurisdiction. In both cases, the court in two-page orders agreed with Western that the disputes involved representation issues over which the NMB has exclusive jurisdiction. Both unions timely appealed.

THESE APPEALS

The merits of these appeals concern essentially jurisdictional questions. They are whether the provisions of the collective bargaining agreements or the letters of agreement, are enforceable through arbitration, or whether they raise questions of representation that can be decided only by the NMB.

The RLA, which governs labor relations in the railroad and airline industries, defines three classes of labor disputes. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Texas International Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983) (representation, minor, and major). None of the parties contend that this is a major dispute, so we are concerned only with the distinction between representation and minor disputes.

Representation disputes involve determining the collective bargaining representative of the employees and the proper bargaining unit, craft, or class of employees to be represented. *Id.* at 158-59. A dispute as to the proper representative of airline employees is committed to the

exclusive jurisdiction of the NMB. *Id;* 45 U.S.C. § 152 (Ninth). Thus, federal courts lack jurisdiction over actions raising such disputes.

A minor dispute involves a disagreement over the application or interpretation of an existing collective bargaining agreement. *International Association of Machinists and Aerospace Workers v. Aloha Airlines, Inc.*, 776 F.2d 812, 815 (9th Cir. 1985). Any controversy over the meaning of a collective bargaining agreement in the context of a particular fact situation is a minor dispute. *See International Association of Machinists and Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1984), *Kaschak v. Consolidated Rail Corp.*, 707 F.2d 902, 905 (6th Cir. 1983). We have said that where the position of one party is expressly and arguably predicated on the terms of the agreement, "the question of whether the position is well taken involves a minor dispute." *Switchmen's Union of North America v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). *Aloha Airlines*, 776 F.2d at 816; *O'Donnell v. Wien Air Alaska, Inc.*, 551 F.2d 1141, 1146-47 (9th Cir. 1977). The exclusive means of resolving such disputes is through RLA grievance and arbitration procedures which can be compelled by court order. *See Republic Airlines*, 761 F.2d at 1389-90. The arbitrator, however, has primary and exclusive jurisdiction to interpret the provisions of a collective bargaining agreement and fashion the appropriate award in case of breach. *Id.* at 1390.

It is important here to view these cases in the context in which they now exist. The unions have been certified by NMB as the bargaining representatives of Western employees. At the time these cases were filed, Western existed as an independent operational entity. However, Western's separate corporate operations at the time of this writing are scheduled to cease momentarily.

The unions are not seeking either by this action or by arbitration to obtain recognition by Western of their status as the collective bargaining representatives of Western's employees; the unions already have such recognition. Similarly, the unions are not seeking a determination that they are the collective bargaining representative of Delta employees. This action seeks arbitration with Western, not Delta. The arbitration is not likely to make a determination that any union or unions will become the representative of Delta employees, given the scope of jurisdiction of the Systems Adjustment Board. *See* 45 U.S.C. § 184. Instead, the unions seek a determination that Western breached its agreement by agreeing to a merger with an airline that did not agree to voluntarily recognize the unions. Thus, strictly speaking, the actions by these unions are not for resolution of "representation" disputes, but are merely claims that Western has breached its contract.

Western contends, and the district court agreed, that other circuits have held that disputes similar to those raised by IBT and ATE involved representation and thus were not arbitrable. These cases, however, generally involve an attempt by a union after a merger has taken effect to force a successor employer to be bound by a collective bargaining agreement entered into by the union and the predecessor employer. *Texas International Airlines,* 717 F.2d at 158, *International Association of Machinists and Aerospace Workers v. Northeast Airlines, Inc.,* 536 F.2d 975, 976 (1st Cir.), *cert. denied,* 429 U.S. 961 (1976). *See also Air Line Pilots Association, International v. Texas International Airlines, Inc.,* 656 F.2d 16, 17-18 (2d Cir. 1981).

For this reason appellees place particular reliance upon *Air Line Employees Association, International v. Republic Airlines, Inc.,* 798 F.2d 967 (7th Cir.) (per curiam), *cert. denied,* 107 S. Ct. 458 (1986), a case filed before a merger. Although the multi-count complaint contained a count alleging breach of the collective bargaining agreement and

seeking arbitration, the case was clearly a dispute between two unions concerning post-merger representation. The relief sought included a court ordered election to determine majority status. The court properly treated the case essentially as an attempt to secure a court order deciding which union should represent employees after the merger, and dismissed for lack of jurisdiction over representation matters, relying upon the Fifth Circuit's decision in *Texas International Airlines.*

A more instructive decision from the Seventh Circuit is *Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981), in which arbitration of a successor-employer clause was sought. The court affirmed an order enjoining a sale of corporate assets pending arbitration, stating:

> We conclude that the Union's claim that the proposed sale of the [company] violates the "successors" clause of the collective bargaining agreement raises a sufficiently "genuine" dispute to support a status quo injunction. We decline Panoramic's invitation to parse the language of the "successors" clause, which Panoramic contends cannot support the Union's interpretation. Contract interpretation is the function of the arbitrator not the courts.

Id. at 285. Although *Panoramic* arose under the National Labor Relations Act rather than the RLA, the role of the arbitrator in interpreting the contract under the RLA is exclusive, and thus very broad. *Aloha Airlines,* 776 F.2d at 815. *See also International Association of Machinists and Aerospace Workers v. Northeast Airlines, Inc.*, 473 F.2d 549, 551 (1st Cir.), *cert. denied,* 409 U.S. 845 (1972). In *Northeast Airlines,* the collective bargaining agreement provided that it would be binding on successors of Northeast, and that if a merger were imminent, representatives of Northeast and the union would meet to negotiate pro-

tective provisions for Northeast employees. Although the court refused to enjoin the merger due to its finding under a balance of hardships analysis that Northeast would go out of business if the merger failed, *id.* at 553-59, it stated that whether Northeast was required by the successor-employer clause to negotiate with the union regarding post-merger employee rights was a minor dispute and thus arbitrable. *Id.* at 554-55.

We have recognized that injunctive relief is appropriate to compel parties to fulfill their obligations under the RLA. *Federal Express Corp. v. Teamster Union,* 617 F.2d 524, 526 (9th Cir. 1980). Arbitration is such an obligation and we therefore hold that the district court erred in deciding that it was without jurisdiction to enter an order to arbitrate.

We face, however, the practical problem that at this late stage, with the merger imminent and one party to the arbitration about to cease its independent existence, the district court will lose jurisdiction to enter an effective arbitration order if the merger takes place as presently planned. The unions have therefore asked that we enjoin the merger in its entirety pending arbitration, a step resisted by Western because of the disruption to its other contractual obligations. Such disruption may be avoided, however, if appropriate steps are taken to see that the successor corporation agrees to honor the contractual obligations, if any, of Western to the unions.

We express no opinion as to the proper interpretation of the contract or the appropriate remedies in the event the arbitrator determines that there has been a breach. We expressly decline to decide whether the arbitrator can validly order representation by any union. It is the function of the arbitrator, not the courts, to decide the meaning of the contract and to consider appropriate remedies in the first instance. The courts can and should preserve the status quo so that such arbitration may proceed under the

RLA. *See Brotherhood of Locomotive Engineers*, 363 U.S. at 531.

We have therefore directed the following:

1. The judgments of the district court dismissing the unions' actions are reversed and the causes are remanded with instructions to enter orders compelling arbitration.

2. Western's motion for reconsideration of our order compelling arbitration pending appeal is denied.

3. The contemplated merger of Western Air Lines and Delta Air Lines is enjoined pending completion of arbitration proceedings or until Western and Delta file with the clerk of this court a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, will bind the successor corporation. Upon filing of such stipulation and approval by this court, the injunction of the merger shall terminate.

4. Subject to the provisions of the foregoing paragraph, the district court shall retain jurisdiction to ensure that the arbitration proceeds without undue delay.

5. Because the injunction is ordered to preserve the jurisdiction of the district court and the Systems Adjustment Board, under the Railway Labor Act, no bond will be required.

6. Each party is to bear its own costs.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 87-5657/5667

D.C. Nos.
CV-86-7921-JMI
CV-86-8032

FILED
MAR 31 1987

IBTCWHA, LOCAL UNION NO. 2702,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC., *et al.*,
Defendants-Appellees

AIR TRANSPORT EMPLOYEES,
Plaintiff-Appellant,

v.

Western Air Lines, Inc.,
Defendant-Appellee.

ORDER

Before: GOODWIN, SCHROEDER, and POOLE, Circuit Judges

1. The judgments of the district court dismissing the unions' actions are reversed and the causes are remanded with instructions to enter orders compelling arbitration.

2. Western's motion for reconsideration of our order compelling arbitration pending appeal is denied.

3. The contemplated merger of Western Air Lines and Delta Air Lines is enjoined pending completion of arbitration proceedings or until Western and Delta file with the Clerk of this Court a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, will bind the successor corporation. Upon filing of such stipulation and approval by this court, the injunction of the merger shall terminate.

4. Subject to the provisions of the foregoing paragraph, the district court shall retain jurisdiction to ensure that the arbitration proceeds without undue delay.

5. Because the injunction is ordered to preserve the jurisdiction of the district court and the Systems Adjustment Board under the Railway Labor Act, no bond will be required.

6. Each party is to bear its own costs.

It is so ordered. A written opinion will be filed as soon as practicable.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-5657

DC# CV-86-7921-JMI
Central California

IBTCWHA, LOCAL UNION NO. 2702,
Plaintiff-Appellant,

vs.

WESTERN AIR LINES, INC., *et al.*,
Defendants-Appellees.

ORDER

Before: SCHROEDER and POOLE, Circuit Judges

Plaintiff's emergency motion for expedited consideration of the appeal is construed as an emergency motion for an injunction pending appeal compelling arbitration so construed, the motion is granted.

The parties shall negotiate at the earliest possible time to select an arbitrator to decide the merits of the parties' disagreement over the interpretation of their collective bargaining agreement.

If the parties cannot agree within five days of the entry of this order upon an arbitrator, either party may request a list of available arbitrators from the National Mediation Board. The parties shall alternatively strike names from the list. The last remaining name shall be chosen to arbitrate the disputes. If that arbitrator is not available within 10 days of the date on which request is made to the National Mediation Board, the arbitrator on the list whose name was last struck shall be selected.

The parties shall proceed to arbitrate this matter pending this court's decision of the appeal.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-5667

DC# CV-86-8032
Central California

AIR TRANSPORT EMPLOYEES,
Plainfiff-Appellant,

vs.

WESTERN AIR LINES, INC.,
Defendant-Appellee.

ORDER

Before: SCHROEDER and POOLE, Circuit Judges

Appellant's emergency motion for an injunction pending appeal is granted. *See Lopez v. Heckler,* 713 F.2d 1432, 1435 (9th Cir.), *rev'd in part on other grounds,* 463 U.S. 1328, 464 U.S. 879 (1983).

The parties shall negotiate at the earliest possible time to select an arbitrator to decide the merits of the parties' disagreement over the interpretation of their collective bargaining agreements.

If the parties cannot agree within five days of the entry of this order upon an arbitrator, either party may request a list of available arbitrators from the National Mediation Board. The parties shall alternately strike names from the list. The last remaining name shall be chosen to arbitrate the disputes. If that arbitrator is not available within 10 days of the date on which request is made to the National

Mediation Board, the arbitrator on the list whose name was last struck shall be selected.

The parties shall proceed to arbitrate this matter pending this court's decision of the appeal.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 86-7921 JMI (Px)

FILED
FEB 13 1987

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,
Plaintiffs,

v.

WESTERN AIR LINES, INC., *et al.*,
Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the moving and responding papers, and the file in the case, IT IS HEREBY ORDERED as follows:

1. Plaintiffs' Motion for Partial Summary Judgment is DENIED.

2. Defendants' Motion to Dismiss for lack of jurisdiction is GRANTED without prejudice.

It is the duty of the National Mediation Board (hereinafter "NMB") to investigate all disputes regarding employee representatives. 29 C.F.R. § 1203.2. In the present case, the dispute is between the carrier (Western) and the union (the employee representative). The Supreme Court

has held that the jurisdiction of the NMB over representation disputes under the Act is exclusive and the decisions of the NMB are representation matters and not subject to judicial review. *Switchman's Union v. National Mediation Board,* 320 U.S. 297, 64 S.Ct. 95, 98-100 (1943); *General Committee v. Missouri-Kansas-Texas Railroad,* 320 U.S. 323 (1943). Federal Courts may not intervene in a representation dispute but must disclaim jurisdiction and leave to the NMB, the protection of the conditions necessary to insure employee free choice. *Texador v. Suressa,* 590 F.2d 357 (1st Cir. 1978); *Aircraft Fraternal Association v. United Airlines, Inc.,* 406 F. Supp. 492 (N.D. Cal. 1976).

In the following cases, the Court dismissed the action since a representation issue was raised which was within the exclusive jurisdiction of the NMB. In *Airline Employees Associations v. Republic Airlines, Inc.,* 798 F.2d 967, 968 (7th Cir. 1986), *cert. denied,* 55 U.S.L.W. 3358 (November 18, 1986), the Court held that the union's action for expedited arbitration of a grievance and an injunction pending arbitration in a merger case raised representation issues. Similarly, in *Teamsters v. Texas International Airlines, Inc.,* 717 F.2d 157, 158 (5th Cir. 1983), the Court held that an action by a union seeking a declaration that its contract survived a merger raised an issue of representation.

Similarly, in the present case the union's action for an injunction and arbitration of a grievance in a merger, raises a representation issue. Therefore, the Court declines jurisdiction since representation disputes are within the exclusive jurisdiction of the NMB and are not subject to judicial review.

IT IS SO ORDERED.

DATED: 13 FEB 87

JAMES M. IDEMAN
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 86-8032 JMI (Bx)

FILED
FEB 13 1987

AIR TRANSPORT EMPLOYEES,

Plaintiffs,

v.

WESTERN AIR LINES, INC.,

Defendants.

ORDER DISMISSING THE ACTION FOR LACK OF JURISDICTION

This matter came regularly before the Honorable James M. Ideman, United States District Judge, for consideration. After full consideration of the file in the case, IT IS HEREBY ORDERED as follows:

1. The Court *sua sponte* dismisses the instant action for lack of subject matter jurisdiction, without prejudice. The Court finds that the present action raises a representation issue, which is within the exclusive jurisdiction of National Mediation Board (hereinafter "NMB").

2. On January 21, 1987, the Court issued an Order to Show Cause Re Dismissal, whereby the parties were instructed to respond to the Court's Order on or before January 28, 1987. However, the parties have failed to show cause as to why the action should not be dismissed. Accordingly, the Court declines jurisdiction since representation disputes are within the exclusive jurisdiction of the NMB and are not subject to judicial review.

IT IS SO ORDERED.

DATED: 13 Feb 87

JAMES M. IDEMAN
United States District Judge

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC., *et al.*,
Applicants,

v.

IBTCWHA, LOCAL UNION NO. 2702, *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the injunction issued by the United States Court of Appeals for the Ninth Circuit on March 31, 1987, case Nos. 87-5657 and 87-5667, be, and the same is hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

/s/ SANDRA DAY O'CONNOR
Associate Justice of the Supreme Court
of the United States

Dated this 1st
day of April, 1987

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC., *et al.*,
Applicants,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND AIR TRANSPORT EMPLOYEES

AMENDED ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the injunction and order compelling arbitration before the Systems Boards issued by the United States Court of Appeals for the Ninth Circuit on March 31, 1987, case Nos. 87-5657 and 87-5667, be, and the same are hereby, stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

/s/ SANDRA D. O'CONNOR
Associate Justice of the Supreme Court
of the United States

Dated this 2nd
day of April, 1987.

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-716

WESTERN AIRLINES, INC. AND DELTA AIR LINES, INC. *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS AND AIR TRANSPORT EMPLOYEES

ON APPLICATION FOR STAY

[April 2, 1987]

JUSTICE O'CONNOR, Circuit Justice.

Applicants request that I issue a stay pending the filing and disposition of a petition for certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

The underlying dispute in this case involves the division of responsibility for regulation of collective bargaining between airlines and their employees under the Railway Labor Act, 45 U.S.C. §151 *et seq.* The Act defines three classes of labor disputes and establishes a different dispute resolution procedure for each. "Minor" disputes involve the application or interpretation of an existing collective-bargaining agreement. Minor disputes are subject to arbitration by a System Board of Adjustment. 45 U.S.C. §184. While courts lack authority to interpret the terms of a collective-bargaining agreement, a court may compel arbitration of a minor dispute before the authorized System Board.

"Major" disputes involve the formation of collective-bargaining agreements, and the resolution of such disputes is governed by §6 of the Act, 45 U.S.C. §§156, 181.

"Representation" disputes involve defining the bargaining unit and determining the employee representative for collective bargaining. Under §2, Ninth of the Act, the National Mediation Board has exclusive jurisdiction over representation disputes. 45 U.S.C. §152, 181.

Applicants, Western Airlines and Delta Air Lines, entered into an agreement and plan of merger on September 9, 1986. The merger agreement was approved by the United States Department of Transportation on December 11, 1986. On December 16, 1986, shareholder approval of the merger was conferred and Western Airlines became a wholly-owned subsidiary of Delta. On the morning of April 1, 1987, the merger of Western Airlines with Delta was scheduled to be completed. *See infra* at ___.

Respondents represented various crafts or classes of employees of Western Airlines. The Air Transport Employees (ATE) was designated by the National Mediation Board as the bargaining representative for a unit of Western employees consisting of clerical, office, fleet and passenger service employees. The International Brotherhood of Teamsters Local 2707 was the certified representative of three crafts or classes employed by Western: mechanics and related employees, stock clerks, and flight instructors. Each union's collective-bargaining agreement has a provision stating that the agreement shall be binding upon successors of the company.

Delta has substantially more employees than Western in the crafts or classes represented by the unions, and these Delta employees had no bargaining representative. Respondents filed grievances alleging that Western violated the successorship provisions of the two collective-bargaining agreements by failing to secure Delta's agreement to be bound by the collective-bargaining agreements between Western and respondent unions. Western refused to arbitrate the grievances, asserting that they necessarily

involved representation issues and therefore were within the exclusive jurisdiction of the National Mediation Board.

The unions filed separate complaints in the District Court for the Central District of California, each requesting the district court to treat the successor clause dispute as a minor dispute, and compel arbitration of the dispute by the System Adjustment Board. Both complaints were dismissed for lack of subject matter jurisdiction.

On March 17, 1987, the Court of Appeals for the Ninth Circuit entered an interim order directing arbitration of the grievances to proceed before the unions' respective System Adjustment Boards pending appeal.

At approximately 8:00 p.m. Eastern Time March 31—little more than 12 hours before the merger was scheduled to take place—the Court of Appeals for the Ninth Circuit issued the following order:

> "1. The judgments of the district court dismissing the unions' actions are reversed and the causes are remanded with instructions to enter orders compelling arbitration.
>
> "2. Western's motion for reconsideration of our order compelling arbitration pending appeal is denied.
>
> "3. The contemplated merger of Western Air Lines and Delta Air Lines is enjoined pending completion of arbitration proceedings or until Western and Delta file with the Clerk of this Court a stipulation that the result of the arbitration, subject to appropriate judicial review and all valid defenses, will bind the successor corporation. Upon filing of such stipulation and approval by the court, the injunction of the merger shall terminate.
>
> . . . . .
>
> It is so ordered. A written opinion will be filed as soon as practicable."

The timing and substance of the Court of Appeal's order under the exigencies of this case made compliance with Rule 44.4 of this Court, requiring that a motion for a stay first be filed with the court below, both virtually impossible and legally futile. I conclude that this situation presents one of those rare extraordinary circumstances in which request for a stay before the Court of Appeals is not required under the Rule.

I also conclude that the judgment of the Court of Appeals, reversing the district court decisions, requiring the entry of orders compelling arbitration, and enjoining the merger, is final within the meaning of 28 U.S.C. §2101(f). The Court of Appeal's provision for lifting the injunction upon certain stipulations of applicants does not divest the judgment of finality when, as in this case, the required stipulations, to have any significance, must bind applicants to a concession of their position on the only question before the Court of Appeals: whether the successor clause dispute is within the jurisdiction of the System Adjustment Board or the National Mediation Board.

Moreover, regardless of the finality of the judgment below, "a Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay." *Coleman v. Paccar, Inc.*, 424 U.S. 1301 (1976) (REHNQUIST, J., in chambers).

The reasoning of every other Court of Appeals that has ruled on the issue raised before the Ninth Circuit casts grave doubt on the validity of the Ninth Circuit's action in this case. The great weight of the caselaw supports the proposition that disputes as to the effect of collective-bar-

gaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board. In *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F. 2d 157 (CA5 1983), the Court of Appeals for the Fifth Circuit held that "[t]he [Railway Labor] Act commits disputes involving a determination of who is to represent airline employees in collective bargaining to the exclusive jurisdiction of the National Mediation Board." The Fifth Circuit stated, "A court may not entertain an action involving such a dispute even if it arises in the context of otherwise justiciable claims. Moreover, a court may not grant injunctive relief maintaining the status quo if the underlying dispute is representational in nature, because to do so would necessarily have the effect, at least during the period of the injunction, of deciding the representation issue." *Id.*, at 161. "Given the Mediation Board's undeniable sole jurisdiction over representation matters," and the practical problems of divided jurisdiction among the other dispute-resolution fora, the Fifth Circuit inferred "a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements." *Id.*, at 164. The Court of Appeals for the Seventh Circuit treated the question of National Mediation Board jurisdiction over alleged collective bargaining violations implicating post-merger representation as one settled by "the overwhelming and well-developed case law," and found "no reason to depart from the consistent and well-considered analysis of our colleagues in other circuits." *Air Line Employees v. Republic Airlines, Inc.*, 798 F.2d 967, 968, *cert. denied*, ___U.S. ___(1986). See also *Air Line Pilots Ass'n Int'l v. Texas Int'l Airlines*, 656 F. 2d 16 (CA2 1981); *International Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F. 2d 975, 977 (CA1), *cert. denied*, 429 U.S. 961 (1976); *Brotherhood of Ry. & S.S. Clerks v. United Air Lines, Inc.*, 325 F. 2d 576 (CA6 1963), *cert. dismissed*,

379 U.S. 26 (1964). It was upon this overwhelming body of caselaw that the District Court for the District of Columbia relied when it considered the complaint of the Association of Flight Attendants (AFA), also arising from the Western-Delta merger. AFA's complaint, seeking an order compelling Western to submit to arbitration by the System Board of Adjustment and enjoining the merger pending completion of proceedings before the System Board, was dismissed. *Association of Flight Attendants, AFL-CIO v. Western Airlines, Inc.*, No. 87-0040 (D DC February 20, 1987). On March 31, 1987 the Court of Appeals for the District of Columbia Circuit denied AFA's motions to compel arbitration pending appeal, and its motion for expedited appeal and decision before April 1. *Association of Flight Attendants, AFL-CIO v. Western Airlines, Inc.*, No. 87-7040. The Ninth Circuit's divergence from this line of Court of Appeals decisions leads me to find it very likely that at least four Justices would vote to grant certiorari, and that the applicant is likely to prevail on the merits.

To appreciate the balance of the equities created by the Ninth Circuit's order, one must focus on the stipulation clause of that order. What was to be gained or lost by the applicants and respondents in this case was not the merger of Western and Delta Airlines alone but the substance of the stipulation on which that merger was conditioned by the Ninth Circuit.

The stipulation which the Ninth Circuit required from Western and Delta Airlines is subject to two interpretations. The first is a requirement that Delta and Western agree that if, after full judicial review of the *jurisdictional* as well as other issues raised, it is determined that the claims presented by the respondents fall under the jurisdiction of the System Adjustment Board, the successor corporation will be bound by the result of the completed arbitration process. Under this interpretation of the stipulation, the successor corporation was required to do no

more than adhere to the obligations placed upon it by law, as those obligations are determined in the litigation. Those legal obligations, of course, would exist independent of any stipulation. If the stipulation would leave the applicants free to assert any of their arguments against the jurisdiction of the System Adjustment Boards, the applicants would have remained in the same position after the stipulation as they were before, and the stipulation would have served no purpose.

The other interpretation of the clause is that, in order to avoid an eleventh hour injunction of the merger, Delta and Western were required to stipulate as to the correctness of respondents' argument that this dispute *did* in fact fall under the jurisdiction of the Systems Adjustment Board. As to the balance of equities on this interpretation of the Ninth Circuit's order, they clearly weigh in favor of the applicants. The potential harm that would be suffered by applicants as a result of the Court of Appeals' injunction of their merger is seriously aggravated by the fact that the order issued on the very eve of the merger's consummation. For several months, applicants have been planning to combine their large-scale, complex, inter-related and heavily regulated operations effective April 1, 1987. That planning included the transfer, modification and cancellation of hundreds of Western's contracts for supplies and services and equipment leases. The approval of the Federal Aviation Administration of changes in Western's operating certificates, specifications and training programs have been sought and received. Maintenance schedules, flight schedules and staffing schedules have been modified in order to effect a smooth transition to a merged operation on April 1. Large numbers of Western management personnel, without whom it cannot operate as an independent entity, are to be severed effective April 1; many have presumably arranged for new employment. Delta has negotiated for transfer of Western's Mexican and Canadian routes with the respective governments of

those countries. It is doubtful that these arrangements can be undone if the merger does not take place as anticipated.

Because of the operational adjustments that are already in place, the FAA has expressed doubt whether Western will be permitted to continue operations should the merger not take place, potentially stranding thousands of travelers. Employees, expecting to be transferred to new locations after April 1, have sold old homes and bought or leased new ones. Changes in pay, working conditions, and conditions of employment all have been planned for and relied upon in anticipation of the merger. Millions of dollars of advertising have been targeted toward the April 1, 1987 merger date. And the list of consequences goes on. See Emergency Application for Stay and Vacation of Injunction, Affidavit of Hollis Harris and Exhibit 1 thereof; Affidavit of Robert Oppenlander; Affidavit of Russell H. Heil; Affidavit of Whitley Hawkins; Affidavit of C. Julian May; Affidavit of Jason R. Archambeau. The cost of enjoining this huge undertaking only hours before its long awaited consummation is simply staggering in its magnitude, in the number of lives touched and dollars lost. To assume that enjoining of the merger would do no more than preserve the "status quo," in the face of this upheaval, would be to blink at reality. Under the second interpretation of the stipulation clause—the only interpretation under which the required stipulations would have had meaning—applicants could prevent these losses only by conceding their argument, supported by the great weight of authority, that their dispute with respondents fell under the jurisdiction of the National Mediation Board. On the other side, respondents had no entitlement to such a concession, obtained under these circumstances, from parties that had otherwise indicated their intent to continue to assert the contrary position on the jurisdictional issue. Before the Court of Appeals the unions argued that completion of the merger would moot their claims under the collective-bargaining agreement to System Board ar-

bitration. For the reasons stated above, I doubt that respondents' claims would ultimately prevail. Moreover, preservation of respondents' claims could have been accomplished equitably by a speedier resolution of the jurisdictional issue, rather than by the inequitable last-minute foisting of a Hobson's choice on applicants. Finally, the employees themselves are protected by Delta's assumption of the Allegheny-Mohawk Labor Protective Provisions, requiring the continuation of certain fringe benefits, displacement and dismissal allowances for up to four to five years for employees who lose their jobs or get lesser-paying jobs, moving and related costs for employees required to move, integration of seniority lists and binding arbitration of any dispute relating to the labor protective provisions. See *Allegheny-Mohawk Merger Case,* 59 C. A. B. 22 (1971); Heil Affidavit, ¶6.

Because the stipulation upon which the lifting of the injunction was conditioned appears to be either unnecessary or extremely inequitable, depending upon its interpretation, and because it appears to me likely that at least four Justices would vote to grant certiorari and that the applicants are likely to prevail on the merits, I grant the requested stay of the Court of Appeals for the Ninth Circuit's injunction and order compelling arbitration before the Systems Boards, pending the timely filing and subsequent disposition of a writ of certiorari in this case.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 87-7040

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Appellant,

v.

WESTERN AIRLINES, INC.

BEFORE: Mikva, Buckley and D.H. Ginsburg, Circuit Judges

FILED MAR 31 1987

O R D E R

Upon consideration of Appellant's Emergency Motion for Injunction To Compel Arbitration Pending Appeal and the Opposition and Response thereto and of Appellee's Emergency Motion For Expedited Appeal And Decision Before April 1, 1987, it is

ORDERED by the court that Appellant's motion to compel arbitration be denied. It is

FURTHER ORDERED by the court that Appellee's motion to expedite be denied.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-0040

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Plaintiff.

v.

WESTERN AIRLINES, INC.,
Defendant.

MEMORANDUM

This is a labor dispute which has arisen under the Railway Labor Act, 45 U.S.C. § 151 to 188 (1982) ("RLA"). It comes before the Court on plaintiff union's ("AFA") verified complaint and dispositive cross-motions. Defendant Western Air Lines, Inc. is scheduled to merge with Delta Air Lines, Inc. on April 1, 1987. Western's employees are represented by several different unions according to craft, including AFA. Delta is a non-union carrier. AFA claims that Western has breached its 1984 collective bargaining agreement with AFA by failing to bind Delta to the terms of that agreement.

FACTS

There are no material facts in dispute.

(1) On September 9, 1986, Western and Delta entered into an Agreement and Plan of Merger.

(2) On October 21, 1986, AFA filed a grievance over Western's failure to bind Delta to the 1984 collective bargaining agreement.

(3) On November 19, 1986, Western denied the grievance.

(4) On November 26, 1986, AFA submitted the dispute to Western's System Board of Adjustment pursuant to Section 24 of the collective bargaining agreement, and Western refused to arbitrate. Section 24(D), established under 45 U.S.C. § 184 of the RLA, provides for jurisdiction in the System Board over disputes "growing out of grievances or out of interpretation of application of any of the terms of the" collective bargaining agreement but "shall not extend to change in hours of employment, rates of compensation or working conditions . . . ."

(5) On December 11, 1986, the U.S. Department of Transportation gave final approval to the Agreement and Plan of Merger under the Federal Aviation Act.

(6) On December 18, 1986, as the first step looking toward merger, Delta acquired 100% control of Western and became its parent.

(7) On January 8, 1987, AFA filed its complaint with this Court. Western's motion to transfer the case to the U.S. District Court for the Middle District of California[1] was denied on January 20, 1987, and the motions now before the Court were promptly filed and opposed.

(8) In Section 5.9 of the Agreement and Plan of Merger, Delta and Western agreed that Western would continue to honor its 1984 collective bargaining agreement with AFA while it was a separate company under Delta's control. This has been done and there is no claim to the contrary. No layoffs are contemplated, either before or after the merger. If Western merges as planned into Delta on April 1, 1987, all Western flight attendants presently represented by AFA will become employees of Delta, supplementing and combining with Delta's much larger complement of flight attendants. Significantly higher wages and benefits will be paid flight attendants now represented

[1] Unions certified as representing Western employees engaged in other crafts are raising comparable issues there.

by AFA when they are Delta employees but, of course, they will be subject to Delta's own procedures, policies and rules governing flight attendants.[2]

(9) AFA's 1984 collective bargaining agreement with Western stated in Section 1(C):

> *This Agreement shall be binding on any* successor or *merged Company* or Companies, or any successor in the control of the Company, its parent(s) or subsidiary(ies) *until changed in accordance with the provisions of the Railway Labor Act, as amended.* (Emphasis added.)

The Contentions of the Parties

If the merger occurs on April 1, 1987, AFA's certification as the bargaining representative for flight attendants formerly employed by Western who become Delta employees will automatically be extinguished pursuant to the National Mediation Board's established policy.[3]

Characterizing the controversy as simply a "minor" dispute involving the proper interpretation of Section 1(C)[4] and therefore appropriate for resolution by Western's System Board of Adjustment, AFA contends that Section 1(C)

---

[2] In addition, Delta has voluntarily provided significant labor protective commitments to the Western flight attendants.

[3] Where two airlines are merged to form a single transportation system the National Mediation Board, to promote stable labor relations and remove problems of uneven representation, redundancy and confusion, considers the certification of all unions representing the employees of the acquired airline as extinguished on the date of integration. *See* Northwest Airlines, Inc., 13 N.M.B. 399, 400-01 (1986); Republic Airlines, Inc., 9 N.M.B. 49, 54-56 (1980). *See also* Air Line Employees Assoc., Int'l v. Republic Airlines, Inc., 798 F.2d 967, 968-69 n.4 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 458 (1986), International Bhd. of Teamsters v. Texas Int'l Airlines, Inc., 717 F.2d 157, 163 (5th Cir. 1983).

[4] *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723-25 (1945).

does not allow its collective bargaining agreement to be extinguished, but rather requires Western "to bind any successor or parent to that Agreement,"[5] by providing as a condition to merger that after the merger takes place Delta accept and be bound by the terms of AFA's 1984 collectively bargained agreement with Western.[6] AFA seeks an order from this Court directing Western to submit the issue to the System Board of Adjustment and asks the Court thereafter to retain jurisdiction to enforce compliance with any award the System Board makes against Western. If a prompt award is not made the Court is further requested to preserve the status quo by preventing the merger pending completion of proceedings before the System Board.

Western contends that the 1984 collective bargaining agreement is subject to change in accordance with requirements of the RLA as paragraph 1(C) states, noting that by operation of the RLA AFA's certification as the bargaining representative of Western employees must dissolve with the merger. It also contends that a fundamental question of post-merger representation is presented, and that since issues of representation are current and directly involved the System Board lacks jurisdiction under the RLA and the issues fall under the exclusive jurisdiction of the National Mediation Board.

Discussion

The situation presented by these conflicting positions is not one of first impression. Other federal courts have confronted similar labor disputes and their consistent recognition of the primary role of the National Mediation Board in resolving questions of representation has governed. Pursuant to the RLA, 45 U.S.C. §§ 155, 181 and 183, Con-

---

[5] Complaint, ¶ 17.

[6] Complaint, ¶ 18.

gress has clearly relegated all cases involving the representation of airline employees for collective bargaining purposes to the exclusive jurisdiction of the National Mediation Board. *See General Committee of Adjustment v. Missouri-K.-T. Ry.*, 320 U.S. 323, 335-38 (1943); *Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 303-07 (1943); *International Brotherhood of Teamsters v. Texas International Airlines, Inc.*, 717 F.2d 157, 161-62 (5th Cir. 1983); *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16, 22-24 (2d Cir. 1981). *See also* 9 T. Khool, *Labor Law* § 50.07[2] (1986).

Where both representational issues and "minor" disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat the purposes of the RLA.[7] This is particularly true in merger situations where representational issues inevitably arise and it is "impossible to look only to the existence of a collective bargaining agreement and to isolate it from the other operational and representational matters." *International Brotherhood of Teamsters, supra.* 717 F.2d at 163. Thus, in cases presenting union challenges to airline mergers, "[w]here a representation dispute appears on the face of the complaint . . . the court is bound to dismiss the action." *Air Line Pilots Association, International, supra* 656 F.2d at 24 (citing Ruby v. American Airlines, Inc.,

---

[7] *See* International Bhd. of Teamsters, *supra*, 717 F.2d at 164 ("Given the [National] Mediation Board's undeniable sole jurisdiction over representation matters, we infer from the practical problems of divided jurisdiction a congressional intention to allow that agency alone to consider the post-merger problems that arise from existing collective bargaining agreements").

323 F.2d 248 (2d Cir. 1963) (Friendly, J.), *cert. denied*, 376 U.S. 913 (1964)).

There can be no question that the issue of post-merger representation is presented by this dispute. AFA itself recognized in its memorandum in support of summary judgment that a System Board arbitrator might bind Delta to the 1984 agreement "if it wants to proceed with an operational merger," or might otherwise take action that would require Delta, a non-party to the 1984 agreement, to set Western's flight attendants apart from Delta's flight attendants regardless of operational requirements.[8]

For AFA to characterize this as a minor dispute wholly within the province of the System Board ignores the reality of the situation and constitutes an attempt to circumvent procedures clearly mandated by Congress for resolution of disputes by the National Mediation Board under the RLA. *See, e.g., Air Line Employees Association, International v. Republic Airlines, Inc.*, 798 F.2d 967, 968-69 (7th Cir. 1986) (per curiam), *cert. denied*, 107 S. Ct. 458 (1986); *International Brotherhood of Teamsters, supra*, 717 F.2d at 160-61; *Air Line Pilots Association, International, supra*, 656 F.2d at 23-24.

Conclusion

AFA is entitled to no relief from this Court, and its motion for summary judgment is denied. Western is granted summary judgment and the complaint is dismissed with prejudice. An appropriate Order is filed herewith.

GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

February 20, 1987.

---

[8] Plaintiff's Memorandum at 25.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBI

Civil Action No. 87-0040

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Plaintiff,

v.

WESTERN AIRLINES, INC.,
Defendant.

ORDER

Upon consideration of plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment and the briefs and exhibits filed on each motion, for the reasons stated in a memorandum filed herewith, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendant's cross-motion is granted, and plaintiff's complaint dismissed with prejudice; and it is further

ORDERED that each party shall bear its own costs.

GERHARD A. GESELL
UNITED STATES DISTRICT JUDGE

February 20, 1987

APPENDIX L

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NO. C-87-0402 MHP

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AIRLINE DIVISION, *et al.*,

Plaintiffs,

v.

PACIFIC SOUTHWEST AIRLINES, *et al.*,

Defendants.

ORDER DISMISSING COMPLAINT

This action under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, arises out of Pacific Southwest Airlines' refusal to arbitrate alleged violations of four collective bargaining agreements (CBAs) reached between the airline and certain classes or crafts of its employees presently represented by the plaintiff union. The dispute centers on the imminent purchase of PSA by USAir, which intends to merge the operations of the two airlines. Although the explicit language of the disputed CBAs oblige PSA to incorporate into the terms of any merger agreement a number of provisions governing the post-merger employment of its workers, the acquisition agreement reached between PSA and USAir omits the stipulated terms. PSA refuses to arbitrate the union's grievance over the exclusion of the CBA's post-merger employment provisions. The union seeks an order compelling arbitration.

In defense of its refusal to arbitrate, PSA argues that the proposed terms required by the CBAs bear on the

determination of the appropriate labor representative for the post-merger workforce. PSA thus contends that it cannot be compelled to arbitrate the terms before its System Adjustment Board, given the National Mediation Board's exclusive jurisdiction over representational matters under the Railway Labor Act. PSA accordingly argues that the court must dismiss for lack of jurisdiction plaintiff's complaint seeking compulsory arbitration. Defendant USAir moves separately for dismissal on essentially the same jurisdictional grounds, though additionally arguing that plaintiff has failed to state a claim against it for which relief may be granted. Without reaching plaintiff's alleged failure to state a claim against USAir, the court finds that the terms of the collective bargaining agreement raise representational issues requiring the complaint to be dismissed in its entirety for lack of jurisdiction.

BACKGROUND

Plaintiff International Brotherhood of Teamsters, Airline Division, currently represents certain classes or crafts of employees of defendant Pacific Southwest Airlines (PSA) pursuant to the provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* In this capacity, the union is signatory to four collective bargaining agreements governing the rates of pay, rules, and working conditions of each represented class or craft. All four agreements expire on December 31, 1987. Among the provisions of the CBAs is language obliging PSA to incorporate into any subsequent merger agreement various terms governing the post-merger employment of its workers. These provisions provide, in pertinent part, as follows:

> The following protective provisions are applicable to mergers, consolidations and acquisitions of PSA operations and those of another carrier(s). The obligations contained herein are subject to the acts and obligations not being in violation of

the labor law as determined by statutes or courts of competent jurisdiction . . . .

A. In the event of a merger, consolidation or acquisition of or by PSA with another carrier . . . where the operation of the two carriers are to be integrated so as to create a single carrier within the meaning of the Railway Labor Act: . . . .

2. Where the majority of employees in the . . . class or craft of the post-merger carrier were employees of a carrier other than PSA . . . the following shall apply:

a. The consolidated, post-merger carrier shall assume the obligations of the IBT [International Brotherhood of Teamsters] Collective Bargaining Agreement, and shall maintain the agreement as to PSA employees represented by the Teamsters Airline Division prior to the merger until it is changed in accordance with Sections 2, 5, and 6 of the Railway Labor Act. The provisions of this Section shall not apply to the employees in the . . . class or craft of the post-merger carrier who are represented by an individual or labor organization other than the Teamsters . . . .

b. The consolidated, post-merger carrier shall recognize the Teamsters Airline Division as the representative of the employees in the post-merger . . . class or craft who were previously represented by the Teamsters . . . .

c. If the employees of the other carrier within the . . . class or craft are unrepresented, the post-merger carrier shall recognize the Teamsters . . . as the representative of all employees . . . if . . . the Union is able to present evidence of a ma-

> jority showing among all employees of the class or craft . . . .
>
> 3. The consolidated, post-merger carrier shall extend to PSA employees in the . . . class or craft, who were represented by the Teamsters . . ., labor protective provisions no less favorable [than those] in the Allegheny-Mohawk Merger Case . . . .
>
> 4. The facilities of PSA . . . shall not be integrated with the facilities of the other airline or entity involved in the merger . . . without agreement of the Teamsters . . . . The employees of PSA, as represented by the Teamsters . . ., shall not be integrated with employees of the other carrier . . . without agreement of the Teamsters . . . .
>
> C. PSA and/or PSA, Inc. agree that they will not enter into or execute any agreement of merger . . . without the language contained in this Section being incorporated into and made part of such merger . . . .

Griswold Affidavit, Exhibit 1 at Article 29; Exhibit 2 at Article 35; Exhibit 3 at Article 42; Exhibit 4 at Article 38.

On December 8, 1986, PSA accepted an offer by USAir to purchase PSA and merge the airline with its own operations. On January 28, 1987, the Department of Transportation tentatively approved the merger agreement. Final shareholder approval of the merger is anticipated at the next corporate meeting of defendant PSA, scheduled for mid-March 1987. After the acquisition, USAir intends to operate PSA as a wholly-owned subsidiary for some time prior to merging the operations of the two airlines. During this period, PSA will continue to honor and operate under the terms of the current CBAs negotiated by plaintiff

union. George Declaration, ¶ 5. Upon the subsequent merger of the two carriers, USAir has indicated that it will provide PSA employees with Allegheny-Mohawk labor protection provisions. George Declaration, ¶ 9. Nonetheless, the terms of the acquisition agreement between PSA and USAir do not include the specific provisions stipulated by PSA's collective bargaining agreements regarding the post-merger employment of its workers, and USAir has conditioned its purchase on the exclusion of such terms.

PSA currently employs approximately 900 workers in its "mechanic and related employees" craft or class. These employees are represented by the plaintiff Teamsters. USAir currently employs approximately 2,300 workers in its "mechanic and related employees" craft or class. These employees are represented by the International Association of Machinists. PSA currently employs approximately 850 workers in its "flight attendant" class or craft, all of whom are represented by plaintiff union. USAir employs approximately 2,600 workers in its "flight attendant" craft or class, all of whom are represented by the Association for Flight Attendants. PSA also employs approximately 2,000 workers in a combined "fleet and passenger service employees" craft or class, represented by the plaintiff Teamsters. USAir has no parallel craft or class certification. Of the approximately 6,450 USAir workers in fleet and passenger service positions, 1,700 are represented by the Teamsters while the balance have not selected a collective bargaining representative.

DISCUSSION

Labor relations in the airline industry are governed by the provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Under the act, disputes between employers and employees are classified as either minor, major, or representational. *Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 158 (5th Cir. 1983). Minor disputes involve disagreements over the interpretation of

the terms of existing collective bargaining agreements; major disputes involve disagreements over the formation of such agreements; and representational disputes involve the determination of the employee representative for purposes of collective bargaining and other aspects of employer-employee relations. *Id.*

Under the statute, a different mechanism exists for the resolution of each type of dispute. Minor disputes are committed to an arbitration process before a system board of adjustment, which is the mandatory and exclusive forum for the resolution of such disagreements. 45 U.S.C. § 184. Representational disputes, governed by section 2, Ninth of the Railway Labor Act, are committed to the exclusive jurisdiction of the National Mediation Board (NMB), which is empowered to investigate disputes and certify the appropriate labor representative. 45 U.S.C. § 152, Ninth; *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297 (1943). While a court lacks the authority to interpret the terms of a collective bargaining agreement, it can act on a complaint to compel arbitration of a minor dispute before the authorized board of system adjustment. *Int'l Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, *reh'g denied*, 373 U.S. 947 (1963). When faced with a complaint implicating representational issues, though, a court cannot intercede and is obliged to dismiss the action for lack of jurisdiction in deference to the National Mediation Board's exclusive dominion over the field of employee representation. *Air Line Employees Ass'n, Int'l v. Republic Airlines, Inc.*, 798 F.2d 967, 969 (7th Cir.), *cert. denied*, ___U.S. ___, 107 S. Ct. 458 (1986).

The plaintiff union attempts to characterize the present dispute as a minor disagreement over the interpretation and application of an existing collective bargaining agreement, and thus seeks an order to compel arbitration of its grievance before the System Adjustment Board. Defendant PSA argues conversely that while the dispute arises in the context of contractual language, the disputed

terms bear directly on the determination of the appropriate labor representatives for the post-merger carrier's employees. The defendant therefore argues that the complaint must be dismissed for lack of jurisdiction.

While the classic representational dispute involves a disagreement between two unions or a group of employees and a union over the determination of an appropriate collective bargaining representative, an overt conflict is not required to raise a representational issue. "A representation dispute may occur even if only one union claims to represent the employees if there is a question whether a majority of the craft or class desires the union's representation. Representation disputes include issues whether two related carriers will be treated as one for representation purposes, and whether a craft or class must be systemwide or may be split for representation purposes." *Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d at 159. Thus in the context of mergers, courts have held consistently that although disputes over the interpretation and continuing effect of existing collective bargaining agreements may appear contractual on their face, and may pit a union only against the employer or its members, such disputes must be left to the execlusive authority of the National Mediation Board if question of post-merger representation are implicated.[1] *Bhd. of Railway and Steam-*

---

[1] Plaintiff attempts to rebut the weight of this authority with the holding of courts interpreting section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974); *Amalgamated Clothing and Textile Workers Union v. Ratner Corp.*, 602 F.2d 1363 (9th Cir. 1979). The significant differences between the Labor Management Relations Act and the Railway Labor Act, though, make plaintiff's comparison purely obfuscatory. Section 301 empowers courts to interpret and enforce contractual agreements in a manner wholly unauthorized under the Railway Labor Act, which defines for courts a far more deferential and limited role in its implementation. *See Air Line Pilots Ass'n, Int'l v. Transamerica Airlines, Inc.*, 615 F. Supp. 371, 375 (N.D. Cal. 1985).

ship Clerks v. United Air Lines, Inc., 325 F.2d 576, 579 (6th Cir. 1963), *cert. denied*, 377 U.S. 903, *cert. dismissed*, 379 U.S. 26 (1964); *Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d at 158; *Air Lines Employees Ass'n, Int'l v. Republic Airlines, Inc.*, 798 F.2d at 968; *Int'l Ass'n of Machinists v. Northeast Airlines, Inc.*, 536 F.2d 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *see Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 656 F.2d 16, 18 (2d Cir. 1981).

There is no question that this dispute raises post-merger representational issues over which the court has no jurisdiction. The terms of the collective bargaining agreements which plaintiff seeks to enforce bear directly on the post-merger representation of employees of both PSA and USAir. Since the disputed terms arise in the context of contractual language prospectively obliging PSA to assure the inclusion of certain terms in any subsequent merger agreement, the provisions do not purport to directly govern the post-merger employment and representation of any employee. Nonetheless, courts have consistently held that such terms effectively deny the National Mediation Board's sole jurisdiction over representation matters.[2] Courts therefore have refused to compel arbitration over the failure of an acquired or acquiring employer to give effect to CBA language purporting to bind successors to existing representational provisions, insofar as the disputed contractual terms effectively raise post-merger representational issues falling outside the courts' jurisdiction. *Bhd. of Railway and Steamship Clerks*, 325 F.2d at 577; *Ass'n of Flight Attendants v. Western Airlines, Inc.*, No. 87-0040, slip op. (D.D.C. February 20, 1987). The instant action is

---

[2] The collective bargaining agreements here in dispute explicitly acknowledge that the disputed language must be subordinated to the requirements of the law: each states that its provisions regarding post-merger employment and representation are to be given effect only insofar as they are not "in violation of the labor law as determined by statutes or courts of competent jurisdiction."

indistinguishable from these cases; while the disputed language here is more explicitly binding than the successorship language there challenged, both would unambiguously require the same representational obligations if given effect.[3]

The two cases cited by plaintiff which purportedly contradict this interpretation are clearly distinguishable. One is a decision by the court in *Ass'n of Flight Attendants v. Republic Airlines, Inc.*, No. 86 C 3164, slip op. (N.D. Ill. June 11, 1986), rendered prior to the completion of Republic's merger with Northwest Airlines. There the plaintiff union brought an action to compel Republic to arbitrate its alleged noncompliance with a provision of its CBA requiring it to assure that Allegheny-Mohawk labor protection provisions be included in any subsequent merger agreement. The court held that the dispute was arbitrable. The holding is critically distinguishable from the case at bar insofar as there was no post-merger representation issue on the face of the complaint; labor protection provisions, not post-merger representational arrangements, were in dispute. To the extent, though, that the court stated without authority and in dicta that it "should not and need not reach out and consider whether or not the ordering of arbitration will somehow impact the representation of all the flight attendants after the merger," the comment flatly contradicts the long and consistent line of precedent requiring courts to look beyond the face of a complaint in search of representational issues disguised as arbitrable contract disputes. As the court stated in *Bhd. of Railway and Steamship Clerks*, "[l]ooking through form to substance, we agree with the District Court that, al-

---

[3] In an action to compel arbitration involving extremely analogous facts and equally explicit agreement provisions, Judge Ideman recently dismissed for lack of jurisdiction a complaint before him filed by the plaintiff in this action. *Int'l Bhd. of Teamsters v. Western Air Lines, Inc.*, No. CV 86-7921 JMI (Px), slip op. (C.D. Cal. February 13, 1987).

though the suit is cast in the form of an action under the law of contracts, it in fact involves a representation dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction 'where validity of the contract depends upon the merits of a representation dispute.' " 325 F.2d at 579.

The other case relied upon by plaintiffs, *Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 567 F. Supp. 56 (S.D. Tex. 1983); is also distinguishable. The grievance on which the union sought to compel arbitration was based strictly on a successor clause in the context of a corporate reorganization, rather than a merger involving multiple unions. At least on its face, the complaint in that action did not allege representational issues. To the extent that representational issues were implicated, this court respectfully disagrees with the holding and chooses to follow the predecessor case in the Second Circuit involving the same dispute, *Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 656 F.2d at 16. In the Second Circuit case the complaint made reference to representational issues. Despite the union's characterization of the issue as whether the employer could avoid provisions of the collective bargaining agreement by forming another company and transferring its operations to it, the court held that the complaint sought resolution of a representational dispute and was within the exclusive jurisdiction of the NMB.

Plaintiff insists that this is a pre-merger case and that the court should look only at the pre-merger side of the transaction. The union argues that it is merely seeking to enforce contract provisions with PSA. Thus, it claims, the arbitrator will not be required to decide representational issues but only restrain PSA from completing the merger until it has complied with particular terms of the collective bargaining agreement. The particular terms it seeks to enforce are clearly representational in nature.

The line plaintiff seeks to construct between pre-merger and post-merger activity is not so bright. Although the merger has not closed, the dispute contemplates post-merger representation in its clearest form. The complaint is not ambiguous about that. In another pre-merger case, *Ass'n of Flight Attendants v. Western Airlines, Inc.*, No. 87-0040, slip op., the court was faced with the same problem; it reached the same result as this court does, concluding that to treat the matter as a minor dispute "ignores the reality of the situation and constitutes an attempt to circumvent procedures clearly mandated by Congress for resolution of disputes by the National Mediation Board under the RLA." Slip op. at 7. Other pre-merger cases agree. *See Air Line Employees Ass'n, Int'l v. Republic Airlines, Inc.*, 798 F.2d at 967 (finding exclusive jurisdiction in the NMB in a case where the merger had been approved by the Department of Transportation, but was not yet effective at the time the action was filed); *Int'l Bhd. of Teamsters v. Western Airlines, Inc.*, No. CV 86-7921 JMI (Px), slip op. (C.D. Cal. February 13, 1987). The effort to craft the terms of the agreement to avoid NMB jurisdiction is of no avail. It is clear that the purport of the disputed provisions is to determine representation which is strictly within the jurisdiction of the NMB.

Examination of the specific provisions which plaintiff seeks to enforce reveals that each inarguably raises post-merger representational issues beyond the court's jurisdiction. First, in those classes or crafts where USAir employees have already designated a representative other than the Teamsters, the Teamsters seek to enforce CBA terms upon the post-merger carrier which explicitly require that the Teamsters continue as the designated representative for PSA employees whom it now represents. Thus in the flight attendant and mechanic classes, where the employees of USAir have designated unions other than the Teamsters as their labor representative, enforcement of the disputed terms of the CBAs would require the frag-

mentation of labor representation within classes or crafts of the post-merger carrier.

This effect clearly contravenes the policy of the National Mediation Board to certify representatives on a systemwide basis, and infringes upon its exclusive jurisdiction over the determination of "whether a craft or class must be systemwide or may be split for representation purposes." *Texas Int'l Airlines*, 717 F.2d at 159. As the court in *Texas Int'l Airlines* observed,

> [t]he Mediation Board has itself adopted the rule that, upon a merger of two airlines, "all certifications . . . were extinguished by operation of law." *Republic Airlines, Inc. and Hughes Air Corp.*, 8 NMB 49 (1980). In reaching this conclusion, the Board noted that permitting certifications to survive a merger would lead to "uneven representation, duplication of effort, and confusion." 8 NMB at 54. It would reduce the ability of airlines to integrate operations and to maintain a single system. 8 NMB at 55 . . . . One clerk would have a union representative; two of his neighbors would be unrepresented. One employee's working conditions and grievance procedures would be governed by a collective bargaining agreement; two of his neighbors would not. We defer to the Board's rationale, based on the Board's expertise and the statutory delegation of authority to it, to determine disputes concerning who are the representatives of the carrier's employees.

717 F.2d at 163. Thus to compel the parties to arbitrate a CBA provision requiring the certification of plaintiff Teamsters to represent a minority fraction of employees in certain post-merger classes or crafts clearly would trespass upon representational matters solely within the jurisdiction of the National Mediation Board. *See also Bhd.*

of Railway and Steamship Clerks, 325 F.2d at 579 ("If the District Court had exercised jurisdiction in this case and had granted the relief sought in the complaint, such a determination clearly could have applied to no more than the 2700 former Capital employees, constituting a minority of this class or craft of appellee's employees, 530 of whom are now represented by the International Association of Machinists. Such an impracticable result demonstrates the soundness of the holding . . . that there is to be no judicial intervention in such representation disputes.")[4]

Second, the Teamsters seek to compel arbitration to enforce terms of the CBAs requiring that the Teamsters

---

[4] Plaintiff argues that labor representatives can be certified on a less than systemwide basis if the employer volu "arily consents to the arrangement. "Nothing in federal labor law precludes a successor from voluntarily assuming, as part of its acquisition arrangements, the obligations of labor agreements, including recognition of the union." Plaintiff's Memorandum at 24. It is clear, though, that USAir will not voluntarily recognize post-merger labor representatives on a less than systemwide basis within any given craft or class; plaintiff admits as much by seeking to *compel* the defendants to abide by such an arrangement. Therefore, since the issue raised is not what an employer can voluntarily agree to but rather what an employer can be compelled to do, plaintiff's argument is misplaced. *See Summit Airlines, Inc. v. Teamsters Local Union No. 295*, 628 F.2d 787, 795 (2d Cir. 1980) ("It does not follow, however, that because Summit could recognize Local 851 voluntarily, the Union may, upon Summit's refusal to do so, ignore section 2, Ninth .... The legislative history reflects a preference for classwide representation ....") The holding in *Burlington Northern, Inc. v. The American Ry. Supervisors Ass'n*, 503 F.2d 58 (7th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975), is not contrary. There the court held that a successor who voluntarily assumed and abided by the collective bargaining provisions of an acquired entity, who subsequently repudiated the assumed agreement because the bargaining unit was less than systemwide, could be compelled to arbitrate the enforceability of its agreement with the unit. Here USAir, the acquiring entity, has not voluntarily assumed the obligations of the prior agreement, and in fact expressly refuses to do so. This posture can hardly be characterized as a voluntary and binding recognition analogous to that in *Burlington Northern*.

be designated the representative of all post-merger employees in those classes or crafts where USAir employees have not designated a collective bargaining representative, and where PSA employees have selected the plaintiff union. This provision would affect a large number of employees in the fleet and passenger service areas, where USAir employees have not yet certified a collective bargaining representative and where the plaintiff currently represents PSA employees. Again, there can be no question that this provision implicates representational issues solely within the jurisdiction of the National Mediation Board. While the disputed provision of the CBAs requires the Teamsters to demonstrate majority support within one year of the merger to maintain its representation status, the provision nonetheless predetermines the collective bargaining representative for classes or crafts of the post-merger carrier within which a majority of employees have never selected representation. This baldly excludes the National Mediation Board from a process over which it has exclusive authority, and thus cannot be placed before a system board of adjustment for arbitration as a minor dispute.

Finally, the Teamsters seek to enforce a number of substantive provisions regarding the post-merger employment of PSA workers, including the integration of the airlines' facilities and seniority lists, the continued application of the existing collective bargaining agreements, and the extension of Allegheny-Mohawk labor protection provisions to PSA employees.[5] While these provisions less explicitly implicate representational issues than those discussed above, they nonetheless fall beyond this court's jurisdiction to compel arbitration. As the court in *Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, stated with respect to

---

[5] USAir has indicated that it will provide Allegheny-Mohawk labor protection provisions to PSA employees. It is unclear whether the union nonetheless seeks to arbitrate a grievance with respect to the provision of such protections.

the continued application of a collective bargaining agreement, "[t]he continuance in force of . . . [the] agreement, however, inevitably entailed not only the enforcement [of its provisions] but also the requirement that the Company bargain with the Union concerning those matters . . . . Thus, the Union has an indispensable role in administering the agreement . . . . Continuation of the contract in force unavoidably constitutes a determination of employee representation . . . ." 717 F.2d at 161. Significantly, the CBA terms purporting to govern the post-merger integration of the two airlines' facilities and seniority lists explicitly require the involvement and approval of the plaintiff union.

To the extent that any of these matters are entirely divorced from representational issues, though, and actually do constitute minor disputes, it is inappropriate for the court to attempt to distribute the issues between the National Mediation Board and the System Adjustment Board. As Judge Gesell observed,

> [w]here both representational issues and "minor" disputes which arguably may not involve representational issues are involved in a single dispute, it is not the role of a court to attempt to define such minor issues and require they be segregated for evaluation by the System Board. As a practical matter the issues inevitably overlap, and any attempt to divide jurisdiction between the System Board and the National Mediation Board would defeat the purposes of the RLA. This is particularly true in merger situations where representational issues inevitably arise and it is "impossible to look only to the existence of a collective bargaining agreement and to isolate it from the other operational and representational matters."

(citations omitted) *Ass'n of Flight Attendants v. Western Airlines, Inc.*, No. 87-0040, slip op. at 5-6; *see also Texas*

Int'l Airlines, 717 F.2d at 164. Thus "as soon as the action reveals a representation dispute, the court is required to dismiss the complaint." *Air Line Pilots Ass'n, Int'l v. Texas Int'l Airlines, Inc.*, 656 F.2d at 23.

ACCORDINGLY, since this complaint raises representational issues over which the court has no jurisdiction, the action is dismissed with prejudice.

IT IS SO ORDERED.

DATE: MAR 20, 1987

MARILYN HALL PATEL
MARILYN HALL PATEL
United States District Judge

APPENDIX M

STATUTORY MATERIAL

I. Railway Labor Act, Section 2, Fourth; 45 U.S.C. § 152, Fourth

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purpose of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

II. Railway Labor Act, Section 2, Ninth; 45 U.S.C. § 152, Ninth.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees des-

ignated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

III. Railway Labor Act, Section 201; 45 U.S.C. § 181

All of the provisions of subchapter I of this chapter except Section 153 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such

carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

FILED
JUN 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1855

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

DELTA AIR LINES, INC. and WESTERN AIR LINES, INC.,
Petitioners,
v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR TEAMSTER RESPONDENTS IN OPPOSITION

ROLAND P. WILDER, JR.
Counsel of Record
WILLIAM LURYE
BAPTISTE & WILDER, P.C.
1919 Pennsylvania Avenue, N.W.
Suite 505
Washington, D.C. 20006
(202) 223-0723

WILMA B. LIEBMAN
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624-7464
Attorneys for
Teamster Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether a grievance over the alleged premerger breach of a collectively bargained successorship clause, which is lodged with and seeks relief only from the signatory employer, is an arbitrable "minor" dispute under the Railway Labor Act.

2. Whether a federal district court has jurisdiction to compel the signatory employer to submit to arbitration of a grievance over the alleged premerger breach of a successorship clause before a system board of adjustment, where the system board is not called upon to designate a representative for postmerger employees.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
Relevant Facts	2
The Proceedings Below	4
The Proceedings Before This Court	6
REASONS FOR DENYING THE WRIT	6
I. THE DECISION OF THE COURT BELOW, CONCLUDING THAT AN ARBITRABLE MINOR DISPUTE EXISTED, FOLLOWS THIS COURT'S ESTABLISHED PRECEDENTS, AND IS CONSISTENT WITH THE RAILWAY LABOR ACT	6
A. Only A System Board of Adjustment Has Jurisdiction Over Minor Disputes; The Dispute Over The Successorship Clause Is A Minor Dispute	6
B. Arbitration Of A Successorship Clause Does Not Give Rise To A Representation Dispute, For The Arbitrator Is Not Called Upon To Determine A Collective Bargaining Representative Or The Appropriate Craft Or Class Of Employees	10

TABLE OF CONTENTS—Continued

Page

II. NO OTHER CIRCUIT COURT OF APPEALS HAS DECIDED WHETHER A DISPUTE ARISING UNDER A SUCCESSORSHIP CLAUSE IN AN RLA AGREEMENT IS ARBITRABLE, AND THEREFORE AN INTER-CIRCUIT CONFLICT CANNOT EXIST 16

III. THE DUTY TO ARBITRATE SUCCESSORSHIP CLAUSES PRESENTS NO ISSUE DETRIMENTAL TO THE AIR AND RAIL TRANSPORTATION INDUSTRIES 21

CONCLUSION 23

APPENDICES A-1

A. Statutory Provisions: Railway Labor Act §§ 2, First and 204, 45 U.S.C. §§ 152, First and 184; Labor-Management Relations Act § 301, 29 U.S.C. § 185 ..... A-1

B. Letter of Agreement of September 1, 1984 Between International Brotherhood of Teamsters, Airline Division and Western Airlines, Inc. B-1

C. Board of Arbitration Contract Provisions Contained in Collective Bargaining Agreements Between International Brotherhood of Teamsters, Airline Division and Western Airlines, Inc. C-1

D. Bench Opinion in *Association of Flight Attendants* v. *Republic Airlines, Inc.*, No. 86 C 3164 (N.D. Ill. June 11, 1986) D-1

E. Amended Order of the Court of Appeals for the Ninth Circuit in *IBTCHWA, Local Union No. 2707* v. *Western Airlines, Inc.*, Nos. 87-5657/5667 (June 1, 1987) E-1

TABLE OF AUTHORITIES

CASES — Page

Air Line Employees Association v. *Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.), *cert. denied*, 107 S.Ct. 458 (1986) 16, 17
Air Line Pilots Association v. *Department of Transportation*, 791 F.2d 172 (D.C. Cir. 1986) .. 22
Air Line Pilots Association v. *Texas Int'l Airlines*, 567 F. Supp. 66, *motion for stay denied*, 567 F. Supp. 78 (S.D. Tex. 1983) 8, 10, 18
Air Line Pilots Association v. *Texas Int'l Airlines*, 656 F.2d 16 (2d Cir. 1981) 20
Airline Stewards Association v. *Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289 (1st Cir. 1969) 8
Amax Coal Co. v. *NLRB*, 614 F.2d 872 (3d Cir. 1980), *rev'd in part on other grounds*, 453 U.S. 322 (1981) 8, 10
Andrews v. *Louisville & N.R.R.*, 406 U.S. 320 (1972) 7, 9
Association of Flight Attendants v. *Republic Airlines, Inc.*, 86 C 3164 (N.D. Ill. June 11, 1986) 8, 10
Association of Flight Attendants v. *Western Air Lines, Inc.*, No. 87-0040 (D.D.C. Feb. 20, 1987) .. 20
Brotherhood of Locomotive Engineers v. *Missouri-K.T. R.R.*, 363 U.S. 528 (1960) 6
Brotherhood of R.R. Trainmen v. *Chicago River & I.R.R.*, 353 U.S. 30 (1957) 7
Brotherhood of R.R. Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969) 9
Brotherhood of Ry. and S.S. Clerks v. *United Airlines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964) 18
Brotherhood of Ry. Clerks v. *Ass'n of Non-Contract Employees*, 380 U.S. 650 (1965) 16
Burlington Northern v. *American Ry. Supervisors Ass'n*, 503 F.2d 58 (7th Cir.), *cert. denied*, 421 U.S. 975 (1974) 13
Carey v. *Westinghouse*, 375 U.S. 261 (1964) 11
Communications Workers v. *AT&T Technologies*, 106 S.Ct. 1415 (1986) 8, 9-10, 16

TABLE OF AUTHORITIES—Continued

	Page
Elgin, J. & E. R.R. v. *Burley*, 325 U.S. 711 (1945)	7
Flight Eng'rs Int'l Ass'n v. *Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963)	20
Flight Eng'rs Int'l Ass'n v. *NMB*, 294 F.2d 905 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962)	14
W.R. Grace & Co. v. *Local 759, Rubber Workers*, 461 U.S. 757 (1983)	11
Graphic Communications Union v. *Chicago Tribune Co.*, 779 F.2d 13 (7th Cir. 1985)	21
Howard Johnson v. *Detroit Local Jt. Exec. Bd.*, 417 U.S. 249 (1974)	8
Ind. Union of Flight Attendants v. *Department of Transportation*, 803 F.2d 1029 (9th Cir. 1986)	22
International Association of Machinists v. *Alitalia Airlines*, 600 F. Supp. 268 (S.D.N.Y. 1984), *aff'd*, 753 F.2d 3 (2d Cir. 1985)	16
International Association of Machinists v. *Aloha Airlines*, 776 F.2d 812 (9th Cir. 1985)	7
International Association of Machinists v. *Central Airlines, Inc.*, 372 U.S. 682 (1963)	7, 21
International Association of Machinists v. *Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972)	18, 19
International Association of Machinists v. *Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976)	19
International Association of Machinists v. *Republic Airlines, Inc.*, 761 F.2d 1386 (9th Cir. 1985)	7
International Association of Machinists, Local 1226 v. *Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981)	9
International Brotherhood of Teamsters v. *Texas International Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983)	18
Local Jt. Exec. Board v. *Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3468 (Jan. 13, 1987)	9, 12

TABLE OF AUTHORITIES—Continued

	Page
Lone Star Steel Co. v. *NLRB*, 639 F.2d 545 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981)	8
NLRB v. *American Nat'l Ins. Co.*, 343 U.S. 395 (1952)	15
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937)	9
Order of R.R. Telegraphers, Division 14 v. *Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962)	20
Order of Ry. Conductors v. *Pitney*, 326 U.S. 561 (1946)	11
REA Express, Inc. v. *Ry. Clerks*, 459 F.2d 226 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972)	8
Slocum v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950)	11, 16
Southern Ry. Co. v. *Brotherhood of Locomotive Firemen*, 384 F.2d 323 (D.C. Cir. 1967)	8
Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)	10
Summit Airlines, Inc. v. *Teamsters Local 295*, 628 F.2d 787 (2d Cir. 1980)	13
Switchmen's Union v. *National Mediation Board*, 135 F.2d 785 (D.C. Cir.), *rev'd on other grounds*, 320 U.S. 297 (1943)	14
Switchmen's Union of North America v. *So. Pacific Co.*, 398 F.2d 443 (9th Cir. 1968)	11
Teamsters Local 70 v. *Western Pacific R.R.*, 809 F.2d 607 (9th Cir. 1987)	8
Textile Workers v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957)	9
TTL Distribution, Inc. v. *Local 99, ILGWU*, 551 F. Supp. 649 (S.D.N.Y. 1982), *aff'd without opinion*, 729 F.2d 1444 (2d Cir. 1983)	9, 12
UMWA v. *Eastover Mining Co.*, 603 F. Supp. 1038 (W.D. Va. 1985)	9, 10
UMWA Health & Retirement Funds v. *Robinson*, 455 U.S. 562 (1982)	22

TABLE OF AUTHORITIES—Continued

	Page
United Mine Workers, District 17 v. *Allied Corp.*, 765 F.2d 412 (4th Cir.) (en banc), *cert. denied*, 105 S.Ct. 3527 (1985)	9, 12
UTU v. *Baker*, 499 F.2d 727 (7th Cir.), *cert. denied*, 419 U.S. 839 (1974)	8
UTU v. *Burlington Northern, Inc.*, 458 F.2d 354 (8th Cir. 1972)	8
UTU v. *Penn Central Transp. Co.*, 505 F.2d 542 (3d Cir. 1974)	8
UTU Local 1477 v. *Baker*, 482 F.2d 228 (6th Cir. 1973)	8
Virginian Ry. v. *System Federation No. 40*, 300 U.S. 515 (1936)	13
Whitehouse v. *Illinois Central R.R.*, 349 U.S. 366 (1955)	11, 12, 21
John Wiley & Sons, Inc. v. *Livingston*, 376 U.S. 543 (1964)	10, 11
AGENCY DECISIONS	
Aircal, 14 N.M.B. 33 (1986)	13
Delta-Western Acquisition Case, DOT Order 86-12-30 (Dec. 11, 1986)	19, 22
Galveston Wharves, 4 N.M.B. 200 (1962)	13
Midway-Air Florida Acquisition Case, DOT Order 85-6-33 (June 14, 1985)	22
Northwest Airlines, Inc., 13 N.M.B. 399 (1986)	12, 15
Pan American World Airways, Inc., 7 N.M.B. 225 (1979)	15
Republic Airlines, 8 N.M.B. 49 (1980)	14
Republic Airlines, Inc., 6 N.M.B. 817 (1979)	13
Southwest Airlines, 8 N.M.B. 684 (1981)	13
TWA/Ozark, 14 N.M.B. 218 (1987)	13, 14, 15
ARBITRATOR'S AWARDS	
Martin Podany Associates, 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.)	9, 12
Sexton's Steakhouse, Inc., 76 Lab. Arb. (BNA) 577 (1981) (Ross, Arb.)	9

TABLE OF AUTHORITIES—Continued

Page

STATUTES

29 U.S.C. § 159, § 9 of the National Labor Relations Act 9

29 U.S.C. § 185, Labor-Management Relations Act § 301 9

45 U.S.C. § 151 *et seq.*, Railway Labor Act, as amended:

45 U.S.C. § 151a, Section 2 21

45 U.S.C. § 152, First, Section 2, First 21

45 U.S.C. § 152, Ninth, Section 2, Ninth 9

45 U.S.C. § 184, Section 204 7

Airline Deregulation Act of 1978, 92 Stat. 1705 (1978):

49 U.S.C. § 1378 22

49 U.S.C. § 1551(a) (7) 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1855

DELTA AIR LINES, INC. and WESTERN AIR LINES, INC.,
Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR TEAMSTER RESPONDENTS IN OPPOSITION

Respondents, International Brotherhood of Teamsters, Airline Division ("IBT") and Teamsters Local 2707 and 2747, respectfully urge denial of the petition for a writ of certiorari to review the judgment and orders entered by the United States Court of Appeals for the Ninth Circuit on March 30 and April 1, 1987.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.[1]

STATUTORY PROVISIONS INVOLVED

Certain provisions of the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, are set forth in the appendix to the petition (Pet. App. M). Sections 152, First and 204 of the RLA, 45 U.S.C. §§ 152, First, 184, are set forth in the appendix to this opposition brief. Resp. App. A.

STATEMENT OF THE CASE

Relevant Facts

On September 1, 1984, IBT and Western Airlines, Inc. ("Western") signed a Letter of Agreement, which provided that in the event of an unfriendly takeover effort, as determined by the IBT, Western would require the acquiring carrier to assume the obligations of the IBT collective bargaining agreements.[2] Western agreed to this provision as part of the *quid pro quo* for employee wage and work rule concessions which reduced Western's labor costs by 20 percent.

On September 9, 1986, Western and Delta Air Lines, Inc. ("Delta") entered into an Agreement and Plan of Merger ("Merger Agreement"). The Merger Agreement did not condition Western's acquisition on Delta's assumption of Western's collective bargaining agreements with the IBT. On or about October 15, 1986, the IBT notified Western that the IBT had determined that Western's

---

[1] References to the petition are designated "Pet."; references to the appendix to the petition are designated "Pet. App."; and references to the appendix to this opposition brief are designated "Resp. App."

[2] The Letter of Agreement is reprinted at Resp. App. B.

acquisition by Delta was "unfriendly," and the September 1, 1984 Letter of Agreement was applicable to the transaction. The IBT thus demanded compliance with the Letter of Agreement, and reiterated its demand by letter dated October 27, 1986. On October 30, 1986, Western denied that the Letter of Agreement applied to the Merger Agreement.

On or about November 6, 1986, the IBT filed class action grievances with Western on behalf of each craft or class of employees it represented at Western.[3] The grievances alleged that Western had breached the September 1, 1984 Letter of Agreement by failing and refusing to require Delta to assume the IBT collective bargaining agreements as a condition of acquisition. The relief requested was for the merger not to be effectuated until Western complied with the terms of the Letter of Agreement. The IBT asked Western to agree to refer the grievances directly to the system board of arbitration, which the IBT and Western established to resolve, *inter alia*, disputes arising out of the interpretation or application of the terms of their bargaining agreements.[4]

Western denied the IBT's grievances on November 13, 1986, and also declined to proceed directly to arbitration. At the Company's insistence, the grievances were referred to the Review Board, which constituted the final step of the grievance procedure before arbitration. The Review Board was comprised of equal numbers of IBT and Western representatives. On November 25, 1986, the

---

[3] The IBT represented three crafts or classes at Western: Mechanics and Related Employees, Stock Clerks and Flight Instructors. The three crafts were covered by separate collective bargaining agreements having virtually identical grievance-arbitration provisions. The Letter of Agreement of September 1, 1984, relating to successorship, Resp. App. B, was applicable to all IBT-represented employees.

[4] The arbitration provisions of the bargaining agreements are set forth in pertinent part at Resp. App. C.

Review Board considered the IBT's grievances and deadlocked. The IBT immediately referred the grievances to the IBT-Western system board of arbitration, which is chaired by an impartial arbitrator selected by the parties. Western, however, refused to arbitrate the grievances.

The Proceedings Below

On December 5, 1986, the IBT instituted an action in the United States District Court for the Central District of California to compel Western to arbitrate the IBT's grievances. An order enjoining the merger of Western into Delta pending the outcome of arbitration was also sought.[5] Temporary relief was denied. On December 29, 1986, the IBT filed a motion for summary judgment, and Western and Delta filed a motion to dismiss the complaint, or alternatively for summary judgment. The district court denied the IBT's unopposed motion to expedite responsive briefing and oral argument. Adhering to its normal schedule, the lower court took the matter under submission solely on the papers submitted and without oral argument. On February 13, 1987, the IBT's complaint was dismissed.

The IBT noticed its appeal to the Ninth Circuit Court of Appeals on February 20, 1987. A motion to expedite the appeal filed by the IBT on March 2, 1987 was construed by the court of appeals as a motion for an order compelling arbitration pending appeal. So construed, the motion was granted on March 17, 1987.[6] The appeal was expedited by an order entered on March 20, 1987.[7] On

---

[5] So all necessary parties would be before the court, Delta was made a defendant pursuant to Fed. R. Civ. P. 19.

[6] Arbitration commenced on March 30, 1987, before the IBT-Western system board of adjustment chaired by Robert O. Harris, formerly Chairman of the National Mediation Board, and was completed, but for closing arguments, on March 31.

[7] The appeals court also consolidated the IBT's appeal with the appeal filed by the Air Transport Employees ("ATE"). The IBT and the ATE are collectively referred to hereafter as "the Unions."

or about March 25, 1987, the IBT moved to enjoin the scheduled April 1, 1987 merger pending appeal. On March 27, 1987, Western and Delta filed a consolidated opposition to the IBT's motion to enjoin the merger pending appeal.[8]

A panel of the appeals court heard oral argument on March 30, 1987. The following day, the court of appeals issued an order which reversed the district court, directed Western to arbitrate the Unions' grievances, and enjoined the merger of the carriers "pending completion of arbitration proceedings. . . ." Pet. App. B-1. On April 1, 1987, the court below issued its opinion (Pet. App. A-1), which was amended on June 1, 1987 (Resp. App. E-1).

In concluding that the Unions' grievances were arbitrable minor disputes, the court of appeals reasoned that the "arbitration is not likely to make a determination that any union or unions will become the representative of Delta employees . . ." because "the unions are not seeking a determination that they are the collective bargaining representative of Delta employees . . . . Instead, the Unions seek a determination that Western breached its agreement by agreeing to a merger with an airline that did not agree to voluntarily recognize the Unions." Pet. App. at A-7. Noting that the Unions' "action seeks arbitration with Western, not Delta" (Pet. App. at A-7), the court of appeals "expressly decline[d] to decide whether the arbitrator can validly order representation by any union" because "[i]t is the function of the arbitrator, not the courts, to decide the meaning of the contract and to consider appropriate remedies in the first

---

[8] Also on March 27, Western issued a memorandum to "all employees" which stated that "we [Western] have put together a contingency plan that will permit Western to continue to operate as an independent, wholly-owned subsidiary [of Delta] subsequent to April 1." A copy of this memorandum was filed with the court of appeals on March 30, 1987.

instance." Pet. App. at A-9. Relying on *Bhd. of Locomotive Eng'rs* v. *Missouri-K.T. R.R.*, 363 U.S. 528, 531 (1960), the appeals court considered it appropriate to "preserve the status quo so that such arbitration may proceed under the RLA" (Pet. App. at A-9, -10), and enjoined the merger pending the outcome of arbitration.

The Proceedings Before This Court

On April 1, 1987, Justice O'Connor, as Circuit Justice for the Ninth Circuit, granted Western's and Delta's emergency application for stay of the order of the Court of Appeals for the Ninth Circuit. Pet. App. G-1. On April 2, 1987, Justice O'Connor issued an amended order which stayed the ongoing arbitration between the IBT and Western, and the scheduled arbitration between ATE and Western. Pet. App. H-1.

REASONS FOR DENYING THE WRIT[9]

I. THE DECISION OF THE COURT BELOW, CONCLUDING THAT AN ARBITRABLE MINOR DISPUTE EXISTED, FOLLOWS THIS COURT'S ESTABLISHED PRECEDENTS, AND IS CONSISTENT WITH THE RAILWAY LABOR ACT.

A. Only A System Board Of Adjustment Has Jurisdiction Over Minor Disputes; The Dispute Over The Successorship Clause Is A Minor Dispute.

In directing Western to arbitrate the IBT's successorship grievances before the system board of adjustment, the court below adhered to this Court's decisions and the decisions of other courts of appeal. Thus, it has long been recognized that when a dispute involves the interpretation or application of a collective bargaining agree-

---

[9] Although Western was merged into Delta on April 1, 1987, by virtue of Justice O'Connor's stay order, the IBT respectfully submits that the Court must consider the petition for certiorari in the same factual context as the court of appeals, i.e., when Western and Delta were separate operational entities.

ment, § 204 of the RLA, 45 U.S.C. § 184, mandates that it be referred to an appropriate adjustment board for resolution through arbitration. *Int'l Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 687-89 (1963); *Int'l Ass'n of Machinists* v. *Aloha Airlines*, 776 F.2d 812, 815 (9th Cir. 1985). *See Bhd. of R.R. Trainmen* v. *Chicago River & I.R.R.*, 353 U.S. 30, 38-39 (1957). The jurisdiction of the adjustment board to resolve these so-called "minor disputes" is exclusive.[10] *Andrews* v. *Louisville & N.R.R.*, 406 U.S. 320, 322-23 (1972) (Rehnquist, J.); *Int'l Ass'n of Machinists* v. *Republic Airlines, Inc.*, 761 F.2d 1386, 1390 (9th Cir. 1985).

As the court of appeals recognized, the IBT's grievances arise under an express term of its collective bargaining agreements with Western, as amended by the September 1, 1984 Letter of Agreement. The dispute with Western is entirely over the interpretation or application of the Letter of Agreement wherein Western, as a result of free collective bargaining, voluntarily agreed to "require the merging . . . or acquiring carrier or other entity to assume the obligations of the IBT collective bargaining agreements." Resp. App. B. The IBT's grievances were lodged against Western before the merger, concerned Western's failure to take premerger actions required by the Letter of Agreement, and sought to vindicate employee rights which had accrued prior to the acquisition and merger. Unquestionably, it was a premerger dispute between Western and its employees over the meaning or application of contractual terms.

Because the IBT-Western system board has exclusive jurisdiction over all "disputes or grievances of any employee or employees or disputes or grievances between the

---

[10] A "minor dispute" is a dispute between the carrier and its employees over the meaning or application of an existing bargaining agreement's terms and deals with rights previously accrued. *Elgin, J. & E. R.R.* v. *Burley*, 325 U.S. 711, 723 (1945); *Aloha Airlines*, 776 F.2d at 812.

Company and the Union which may arise under the terms of [the IBT-Western] Agreement . . ." (Resp. App. C), the court below correctly concluded that a minor dispute existed. The matter was properly referred to the system board for resolution.[11] *Accord, Teamsters Local 70* v. *Western Pacific R.R.*, 809 F.2d 607 (9th Cir. 1987); *Airline Pilots Ass'n* v. *Texas Int'l Airlines*, 567 F. Supp. 66, *motion for stay denied*, 567 F. Supp. 78 (S.D. Tex. 1983); *Ass'n of Flight Attendants* v. *Republic Airlines, Inc.*, 86 C 3164 (N.D. Ill. June 11, 1986) (Resp. App. D).

Precedent arising under the NLRA[12] was properly considered by the court below because the issue of whether a minor dispute arises from a grievance over a successor-

---

[11] The test applied by the court below in determining whether the IBT's grievances constituted a minor dispute—whether the dispute was "arguably covered" by a contract term—is in accord with *Communications Workers* v. *AT&T Technologies*, 106 S.Ct. 1415 (1986), and the decisions of other circuit courts of appeal. The Court of Appeals for the Fifth Circuit has employed the same test as the court below. *REA Express, Inc.* v. *Ry. Clerks*, 459 F.2d 226 (5th Cir.), *cert. denied*, 409 U.S. 892 (1972). Other circuit courts have found the existence of a minor dispute where the claim that the contract permits the disputed action is not "obviously insubstantial," *UTU* v. *Penn Central Transp. Co.*, 505 F.2d 542 (3d Cir. 1974); *UTU Local 1477* v. *Baker*, 482 F.2d 228 (6th Cir. 1973); *Airline Stewards Ass'n* v. *Caribbean Atlantic Airlines, Inc.*, 412 F.2d 289 (1st Cir. 1969); *Southern Ry Co.* v. *Bhd. of Locomotive Firemen*, 384 F.2d 323 (D.C. Cir. 1967); the contract is "reasonably susceptible" to the interpretation sought, *UTU* v. *Burlington Northern, Inc.*, 458 F.2d 354 (8th Cir. 1972); and the asserted contractual claim is not frivolous, *UTU* v. *Baker*, 499 F.2d 727 (7th Cir.), *cert. denied*, 419 U.S. 839 (1974).

[12] Successorship clauses have received the tacit approval of this Court. *Howard Johnson* v. *Detroit Local Jt. Exec. Bd.*, 417 U.S. 249, 258 n.3 (1974). In cases arising under the NLRA, successorship clauses have withstood attacks of being unlawful, and have been deemed to be mandatory subjects of bargaining. *Lone Star Steel Co.* v. *NLRB*, 639 F.2d 545 (10th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981); *Amax Coal Co.* v. *NLRB*, 614 F.2d 872 (3d

ship clause does not require statutory interpretations that are unique to the RLA. *Bhd. of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). *See Textile Workers* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 458-59 (1957). Section 9 of the NLRA was modeled on § 2, Ninth of the RLA. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937).[13] Moreover, "since the compulsory character of the administrative remedy provided by the Railway Labor Act for [minor] disputes . . . stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under § 301 of the [Labor-Management Relations Act, 29 U.S.C. § 185]." *Louisville & N.R.R.*, 406 U.S. at 323. Accordingly, under the RLA, more so than under the LMRA, "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT&T*

Cir. 1980), *rev'd in part on other grounds*, 453 U.S. 322 (1981). The courts of appeal have compelled arbitration of successorship clauses in suits brought under § 301 of the LMRA. *See Local Jt. Exec. Board* v. *Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3468 (Jan. 13, 1987); *Int'l Ass'n of Machinists, Local 1226* v. *Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981). Findings that employers have breached successorship clauses substantially identical to the Letter of Agreement have been enforced by the courts. *See United Mine Workers, District 17* v. *Allied Corp.*, 765 F.2d 412 (4th Cir.) (en banc), *cert. denied*, 105 S.Ct. 3527 (1985); *TTL Distribution, Inc.* v. *Local 99, ILGWU*, 551 F. Supp. 649 (S.D.N.Y. 1982), *aff'd without opinion*, 729 F.2d 1444 (2d Cir. 1983); *UMWA* v. *Eastover Mining Co.*, 603 F. Supp. 1038 (W.D. Va. 1985). And, arbitration of breaches of such clauses is common. *See Martin Podany Associates*, 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.); *Sexton's Steakhouse, Inc.*, 76 Lab. Arb. (BNA) 577 (1981) (Ross, Arb.).

[13] *Compare* § 2, Ninth *with* § 9(c) of the original Wagner Act, 49 Stat. 453 (1935).

Technologies, 106 S.Ct. at 1419, *quoting Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).[14]

B. Arbitration Of A Successorship Clause Does Not Give Rise To A Representation Dispute, For The Arbitrator Is Not Called Upon To Determine A Collective Bargaining Representative Or The Appropriate Craft Or Class Of Employees.

A representation dispute is not implicated by the IBT's grievance alleging a breach of the successorship clause set forth in the 1984 Letter of Agreement. *Air Line Pilots Ass'n* v. *Texas Int'l Airlines*, 567 F. Supp. 66; *Ass'n of Flight Attendants* v. *Republic Airlines, Inc.*, 86 C 3164 (Resp. App. D). A representation dispute involves the proper determination of who shall have the right to represent a given class or craft of employees for purposes of the RLA by virtue of their majority status. *Texas Int'l Airlines*, 567 F. Supp. at 70.

In contrast, a successorship clause operates "to assure that successorship would be required before any contract of sale was made, to assure that signatories to the agreement would pass their obligations on to the purchasers. . . ." *Eastover Mining Co.*, 603 F. Supp. at 1044. The clause affects only the postmerger terms and conditions of employment of the seller's employees and does not, after the merger or sale, extend coverage of the contract or recognition of the union to any but the seller's employees. *Amax Coal*, 614 F.2d at 886-87; *Eastover Mining*, 603 F. Supp. at 1047. *See John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 551 n.5 (1964).

---

[14] Delta suggests that its voluntary assumption of LPP's obviates the need to comply with the successorship clause. While a dubious proposition at best, Delta's LPP's do not address the issue of who will represent the employees on the acquired carrier (Western) in enforcing LPP rights, or even whether such rights are enforceable at all.

No representation dispute arose by virtue of the IBT's grievances because they did not constitute demands on Delta to recognize the IBT as the representative of any of its employees. Nor, as the court below stated, were they demands for recognition against Western. Pet. App. A-7. The IBT already represented Western's employees.

Delta suggests that it is appropriate for the judiciary to "look beyond the superficial form of a complaint to determine whether . . . it masks a representation dispute." Pet. at 10-11. But, neither federal nor state courts have jurisdiction to interpret collective bargaining agreements subject to the RLA, even when it is necessary to resolve cases otherwise properly before them. *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950); *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561 (1946); *Switchmen's Union of North America* v. *So. Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). If the arbitrator can interpret the disputed contract provision in a manner that would render it lawful, arbitration is to be compelled. *John Wiley & Sons, Inc.*, 376 U.S. at 555. *See W.R. Grace & Co.* v. *Local 759, Rubber Workers*, 461 U.S. 757, 767-68 n.10 (1983).[15]

Delta's arguments against arbitration assume that the IBT will prevail at arbitration. But, an arbitrator may

---

[15] Thus, even if Delta is correct in its assertions that representational issues are created by the successorship clauses, arbitration is not precluded. *Carey* v. *Westinghouse*, 375 U.S. 261 (1964). There, it could not be determined whether a grievance raised a jurisdictional or representational dispute. After considering *Whitehouse* v. *Illinois Central*, 349 U.S. 366 (1955), an RLA case it considered analogous, the Court held that "[e]ven if it is a representation matter, resort to arbitration may have a pervasive, curative effect . . . ." 375 U.S. at 272. Should the arbitrator's decision exceed the scope of his authority or be inconsistent with federal policy or law, judicial review is available. *W.R. Grace & Co.*, 461 U.S. at 766.

find no violation of the successorship provision at issue, thus avoiding the representation issues that Delta and Western allege might arise. This possible result is in and of itself a sufficient basis to direct arbitration. *See Whitehouse*, 349 U.S. at 373.

Nor would an arbitrator, in order to afford relief to the IBT, have to step into the "representational area exclusively reserved to the NMB," as stated by Delta. Pet. at 10. The arbitrator could find that Western violated the Letter of Agreement, and thereby sustain the Union's grievance, but he might interpret it as permitting only monetary damages. *See Allied Corp.*, 765 F.2d 412; *TTL Distribution Inc.*, 551 F. Supp. 649; *Martin Podany Associates*, 80 Lab. Arb. (BNA) at 663. A damage award could not implicate a representation issue within the NMB's exclusive jurisdiction.

Assuming the arbitrator ruled that the Letter of Agreement precluded an operational merger until Western caused Delta to agree to assume the labor agreements with the IBT, the award would be directed to Western only and would affect only Western's employees. If, after the award, Delta had decided not to assume the agreements, the IBT would have continued to represent only Western's employees, Western would have continued to operate separately from Delta, and no representation issue could have existed. *See Northwest Airlines, Inc.*, 13 N.M.B. 399, 401 (1986) (where two carriers' operations remain unintegrated, no representation issue arises). Delta's decision whether to assume the collective bargaining agreements because of concern over perceived operational difficulties or inefficiencies is an entrepreneurial decision for Delta to make, but is "irrelevant to the issue of arbitrability." *Royal Center, Inc.*, 796 F.2d at 1164. *See Whitehouse*, 349 U.S. at 373.

Assuming Delta decided the benefits of merging Western into its operations outweighed the disadvantages (from its standpoint) of assuming the IBT-Western

agreements, its assumption of the agreements would have amounted to no more than a voluntary recognition of the IBT as the postmerger representative of the employees represented by the Union at Western. Voluntary recognitions are permissible under the RLA. *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515, 548 n.6 (1936); *Summit Airlines, Inc.* v. *Teamsters Local 295*, 628 F.2d 787, 795 (2d Cir. 1980); *Burlington Northern* v. *ARSA*, 503 F.2d 58 (7th Cir), *cert. denied*, 421 U.S. 975 (1974); *Southwest Airlines*, 8 N.M.B. 684 (1981). Indeed, the NMB's stated policy is one of "noninterference in voluntary recognition matters, 'except where such recognition would be in derogation of an existing Board certification.'" *TWA/Ozark*, 14 N.M.B. 218, 234 (1987), *quoting Republic Airlines, Inc.*, 6 N.M.B. 817 (1979). Since Delta's employees were unrepresented, there was no certification in existence which could be derogated by Delta's voluntary recognition of the IBT.

Contrary to Delta's assertions, the recognition of a representative for less than all employees who might be included in a craft or class, does not violate any mandate contained in the RLA. Pet. 21-22. The NMB "has long held that carriers and labor organizations are free to include any employee classifications under a voluntary recognition agreement . . . ." *Aircal*, 14 N.M.B. 33, 42 (1986); *Galveston Wharves*, 4 N.M.B. 200 (1962). Thus, "[i]f the majority of a craft or class has not selected a representative, the carrier is free to make with anyone it pleases and *for any group it pleases* contracts establishing rates of pay, rules or working conditions" (emphasis added). *Virginian Ry.*, 300 U.S. at 548 n.6, quoting with approval the Government's position. *Accord, Burlington Northern*, 503 F.2d at 63.[16] The parties' volun-

[16] In *Burlington Northern*, the court of appeals held:

> Unless a representation determination is made [by the NMB] pursuant to that Act, the voluntary agreement by plaintiff to recognize a collective bargaining representative of a craft or

tary action, of course, would not affect the NMB's authority to designate a different craft or class for collective bargaining purposes if its authority is properly invoked by the filing of an application by an individual or organization alleging a representation dispute.[17] Delta's decision to voluntarily recognize the IBT for a group which does not comprise a systemwide craft or class would be permissible.

The NMB's decision in *TWA/Ozark*, 14 N.M.B. 218, and Delta's subsequent application for an order revoking the IBT's certification, do not demonstrate that arbitration of the successorship clause raises representation issues, or that the court of appeals was without jurisdiction to compel arbitration. The NMB's *TWA/Ozark* decision was a response to carrier abuse of the NMB's so-called "*Republic* merger doctrine."[18] The NMB recognized that:

> . . . carriers have interpreted the *Republic* case to give them independent authority to extinguish existing certifications held by organizations on the acquired carrier; to choose between recognition of organizations on its property or the acquired carrier;

> class that is not system-wide will be given effect. Compare *Switchmen's Union* v. *Nat'l Mediation Board*, 77 U.S. App. D.C. 264, 135 F.2d 785, 792 (1943), *rev'd on other grounds*, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61 (1943). If the contrary were true, the Merger Protection Agreement, which became effective, would have become a nullity upon its effective date, and the representation rights of ARSA would be terminated by the very agreement that purports to continue them in force.

503 F.2d at 63.

[17] *See generally, Flight Eng'rs Int'l Ass'n* v. *NMB*, 294 F.2d 905, 908 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 956 (1962) (stating, "It has become well settled that in making 'craft or class' determinations, the NMB may regroup, amalgamate, or splinter 'historic' bargaining groups, taking into account technological and functional changes . . .").

[18] *Republic Airlines*, 8 N.M.B. 49 (1980).

> and to choose whether or not employees on the acquired carrier will be represented.

14 N.M.B. at 233.

It held that only the NMB could revoke a labor organization's certification. Carriers can invoke the NMB's services merely for the limited purpose of obtaining a determination of whether the Board should revoke a certification. *Id.* at 241-42.

Delta's application before the NMB cannot resolve the issue before this Court. The instant successorship issue must first be resolved for Delta's application to be ripe for resolution by the NMB. The NMB's decision whether to revoke a union's certification after a merger is fact based.[19] *TWA/Ozark*, 14 N.M.B. at 236; *Northwest Airlines*, 13 N.M.B. at 400. Where, as here, there exists an issue of contractual successorship rights, the NMB cannot revoke a union's certification without the prior resolution of the successorship issue, for this is tantamount to the Board's resolving the minor dispute on the merits. The NMB has no authority to enforce the successorship clause or determine its validity. *Pan American World Airways, Inc.*, 7 N.M.B. 225-26 (1979).[20] Arbitration of the successorship clause could result, *inter alia*, in the voluntary recognition of the IBT by Delta as the representative of former Western employees. A decision to revoke the IBT's certification prior to an arbitral resolution would interfere with a matter of voluntary recognition, which the NMB will not do, *TWA/*

---

[19] A merger does not automatically cause a union's certification to terminate, contrary to Delta's assertion. Pet. at 9-10. *TWA/Ozark*, 14 N.M.B. at 235. TWA's flight attendants comprised over 90 percent of the postmerger class or craft, but TWA also voluntarily continued to recognize and treat with the Association of Flight Attendants, which represented Ozark's attendants. For this reason, the NMB determined that AFA's certification continued after the merger. Accordingly, TWA had two unions representing its flight attendants. *TWA/Ozark*, 14 N.M.B. at 238-40.

[20] *See NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

Ozark, 14 N.M.B. at 234, as well as preclude arbitration from running its full course.

No issue of representation is before the NMB. A carrier cannot invoke the NMB's procedures to initiate "employee voting." Pet. at 23. Section 2, Ninth of the RLA, 45 U.S.C. § 152, Ninth, restricts the NMB's authority to investigating representation disputes among employees, not disputes between the carrier and its employees. *Bhd. of Ry. Clerks* v. *Ass'n of Non-Contract Employees*, 380 U.S. 650, 666-67 (1965); *Int'l Ass'n of Machinists* v. *Alitalia Airlines*, 600 F. Supp. 268, 275 (S.D.N.Y. 1984), *aff'd*, 753 F.2d 3 (2d Cir. 1985). Nor may the NMB commence a representation investigation *sua sponte*. *Alitalia Airlines*, 600 F. Supp. at 275.

II. NO OTHER CIRCUIT COURT OF APPEALS HAS DECIDED WHETHER A DISPUTE ARISING UNDER A SUCCESSORSHIP CLAUSE IN AN RLA AGREEMENT IS ARBITRABLE, AND THEREFORE AN INTER-CIRCUIT CONFLICT CANNOT EXIST.

The Ninth Circuit Court of Appeals is the only court of appeals to decide the issue of whether a grievance over a successorship clause gives rise to an arbitrable minor dispute. Hence, the decision below does not conflict with rulings of any other Circuit Court of Appeals. No order declaring that the IBT was the appropriate bargaining representative of Delta's employees was sought or granted. The court of appeals did not direct the arbitrator to issue such an award; nor did it contemplate the issuance of such an award. Its order compelling arbitration presupposed no finding on the merits in accordance with this Court's longstanding precedents. *AT&T Technologies*, 106 S.Ct. at 1419; *Slocum*, 339 U.S. 239.

Air Line Employees Ass'n ("ALEA") v. *Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.), *cert. denied*, 107 S.Ct. 458 (1986), upon which Delta and Western pri-

marily rely, was an attempt by ALEA to obtain a judicial declaration that rival unions prospectively recognized by Northwest Airlines, the carrier "surviving" the merger with Republic, were not the lawful representatives of employees. Northwest recognized two unions as the representatives of its postmerger ground employee complement, thereby supplanting ALEA, which was the premerger representative of Republic's ground employees. ALEA challenged Northwest's actions, with which it had no contract, and, in doing so, called into question the identity of the appropriate representative of the ground employees. 798 F.2d at 968. Thus, ALEA's complaint *inter alia*, sought a declaration that Northwest had a duty to bargain with it "as the representative of the majority in the class or craft involved." 798 F.2d at 968.

In order to grant ALEA relief, including an order compelling Northwest to arbitrate the grievance filed over the recognition, the district court would have had to determine whether ALEA or the unions recognized by Northwest represented the postmerger employee complement. That determination, the court of appeals held, is reserved exclusively for the NMB under § 2, Ninth of the Act. As the court below stated in distinguishing the case, "[t]he court properly treated the case essentially as an attempt to secure a court order deciding which union should represent employees after the merger, and dismissed for lack of jurisdiction over representation matters. . . ." Pet. App. at A-8.

In contrast, the IBT has not filed a grievance against Delta, and made no demand, in either its grievance or its complaint, that the IBT be recognized by Delta as the postmerger representative of Delta's employees. Nor has Delta recognized a union as the representative of the postmerger employees formerly represented by the IBT at Western. Rather, the IBT has challenged Western's

breach of the Letter of Agreement, which gives rise to a minor dispute, by invoking its arbitral remedies against Western as the court below found.

Similarly, in *Int'l Bhd. of Teamsters* v. *Texas Int'l Airlines, Inc.*, 717 F.2d 157 (5th Cir. 1983), the union sought a declaratory judgment that its collective bargaining agreement with Texas International remained in force by operation of law after Texas International was merged into the larger Continental Airlines. The union's claim was not predicated on a successorship clause or any other contract provision. Unlike the instant case, no minor dispute was involved. 717 F.2d at 163-64. The distinction is of decisional significance. *See Air Line Pilots Ass'n* v. *Texas Int'l Airlines*, 567 F. Supp. 66.

Bhd. of Ry. and S.S. Clerks v. *United Airlines, Inc.*, 325 F.2d 576 (6th Cir. 1963), *cert. dismissed*, 379 U.S. 26 (1964), is very similar to *Republic Airlines*. In *United*, unlike here, the representative of employees on Capital (the carrier that was merged into United) sued the *surviving* carrier, United, in an attempt to enforce the successorship clause of the Capital agreement. Thus, the union sought to require United to recognize the union as the representative of its employees, 325 F.2d at 577, and thereby have the Court settle the question of representation between rival unions brought about by the merger. Here, the IBT is attempting only to enforce its agreements with Western against Western. Delta's employees are in no way implicated.

Analysis of the two First Circuit Court of Appeals' decisions arising out of the Delta-Northeast Airlines merger establishes that they are in harmony with the decision below. In *Int'l Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 473 F.2d 549 (1st Cir.), *cert. denied*, 409 U.S. 845 (1972), the union brought suit against Northeast to obtain an order compelling Northeast to bargain with it over postmerger employee rights. It relied upon

a contract provision which required that "[i]n case of a consolidation or merger, representatives of the Company and the Union will meet without delay and negotiate for proper provisions for the protection of employees' seniority and other rights." *Id.* at 551. The appeals court found that a bargaining order based on the contract provision was not appropriate because the failure to bargain was a breach of contract, which generated an arbitrable minor dispute within the exclusive jurisdiction of the system board of adjustment. *Id.* at 554.[21] The court of appeals declined to state whether Delta might be required to bargain with the union over post-merger changes in working conditions. *Id.* at 560 n.17.

In the subsequent case, *Int'l Ass'n of Machinists* v. *Northeast Airlines, Inc.*, 536 F.2d 975 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976), relied upon by Delta, the union amended its complaint to seek an order compelling Delta to negotiate with it over seniority integration. Noting that the union was not the certified representative of Delta's employees, the appeals court would not compel Delta to bargain. To enter a bargaining order, it recognized, a determination that the union represented Delta's employees must first be made. But, the court of appeals also suggested that an order compelling Delta to arbitrate would be appropriate if there were grievance pro-

[21] The appeals court found no independent statutory duty under the RLA to compel Northeast to negotiate. In large part, this conclusion rested upon the Civil Aeronautics Board ("CAB") having been vested with exclusive authority to approve mergers and their terms. The CAB required the carriers to afford employee groups the right to negotiate seniority integration after the merger, which the court stated removed the issue from "the procedures of the RLA." *Id.* at 559-60. The CAB ceased to exist in December 1984, and the Department of Transportation ("DOT") assumed the authority to consider whether a merger is in the public interest. 49 U.S.C. § 1551(a)(7). DOT has uniformly refused to impose labor protective provisions on merging carriers, expressly leaving labor protection to collective bargaining. *See Delta-Western Acquisition Case*, DOT Order 86-12-30 (Dec. 11, 1986).

ceedings at Northeast outstanding, or Delta "refused to submit to a System Board of Adjustment resolution of particular disputes concerning the survival of rights under the Northeast collective bargaining agreements." *Id.* at 977-78.

Other cases relied upon by Delta are easily distinguished. In *Flight Eng'rs Int'l Ass'n* v. *Eastern Air Lines, Inc.*, 311 F.2d 745 (2d Cir.), *cert. denied*, 373 U.S. 924 (1963), the union sought to compel the carrier to recognize and bargain with it after the NMB had conducted an election and certified a rival union as bargaining representative for certain employees. *Air Line Pilots Ass'n* v. *Texas Int'l Airlines, Inc.*, 656 F.2d 16 (2d Cir. 1981), involved an attempt to have a court declare a union the representative of a new carrier's employees, and to compel the carrier to bargain with it. *Order of R.R. Telegraphers, Division 14* v. *Leighty*, 298 F.2d 17 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962), involved an intraunion dispute over who had the right to represent employees, the local union or its parent international union. Again, the disputes sought judicial resolution of the appropriate bargaining representative.

Delta also relies upon a summary order of the Court of Appeals for the District of Columbia, which denied a motion by the Association of Flight Attendants for an emergency motion to compel arbitration, as an indication that "the District of Columbia Circuit is likely to follow other circuits which have concluded that the NMB has exclusive jurisdiction." Pet. at 25. Considering that the order was issued without an opinion, Pet. App. J-1, in a factually dissimilar case,[22] it scarcely supports Delta's contention that review by this Court is warranted.

---

[22] The decision of the district court in *Ass'n of Flight Attendants ("AFA")* v. *Western Air Lines, Inc.*, No. 87-0040 (D.D.C. Feb. 20, 1987) (Pet. App. K-1), does not lend support to Delta's cause. Although the decision also involved a successorship clause, AFA

III. THE DUTY TO ARBITRATE SUCCESSORSHIP CLAUSES PRESENTS NO ISSUE DETRIMENTAL TO THE AIR AND RAIL TRANSPORTATION INDUSTRIES.

Delta's primary basis for asserting an important question of federal law warranting review by the Court is that an air or rail carrier may be required to arbitrate successorship disputes with some of its unions but not all. That is an illusory issue. A carrier might have to arbitrate with the Teamsters but not the Flight Attendants; however, fragmentation of its work force will not result. The unions have separate contracts and discrete claims. Arbitration of a dispute does not cause irreparable harm to a carrier, as Delta seemingly pleads. *Whitehouse*, 349 U.S. at 373; *Graphic Communications Union* v. *Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985). Rather, arbitration before a system board of adjustment was established by Congress as the machinery "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein . . ." and it is "the duty of all carriers, their officers, agents, and employees to exert every reasonable effort . . . to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce." *Central Airlines*, 372 U.S. at 689, *quoting* § 2, 45 U.S.C. § 151a and § 2, First, 45 U.S.C. § 152, First.

Delta further asserts that "disruption" to the airline industry may result from arbitration, and that this "disruption" "is of national concern." The DOT, however, in considering whether LPP's should be imposed on a carrier, has repeatedly stated that even a strike by the carrier's employees in a merger situation "will not dis-

---

apparently intended to seek an order from an arbitrator binding Delta to its bargaining agreements with Western, or to otherwise require Delta to take some unspecified action. Pet. App. at K-6. The IBT, however, sought an order directed only against Western.

rupt the transportation system" because "[w]ith deregulation, other carriers can move quickly to fill gaps in service." *Midway-Air Florida Acquisition Case*, DOT Order 85-6-33 at slip op. p. 6 (June 14, 1985). *See Delta-Western Acquisition Case*, DOT Order 86-12-30 (Dec. 11, 1986). This view has met with judicial approval. *Air Line Pilots Ass'n* v. *DOT*, 791 F.2d 172 (D.C. Cir. 1986); *Ind. Union of Flight Attendants* v. *DOT*, 803 F.2d 1029 (9th Cir. 1986). If DOT, the agency charged with determining if a merger is in the "public interest," 49 U.S.C. § 1378, does not view a strike as disruptive to the national transportation system, and thus contrary to the public interest, arbitration is clearly not going to cause devastating disruption to the national transportation system.

DOT has also held that labor protective provisions should be obtained through free collective bargaining. *Delta-Western Acquisition Case*, DOT Order 86-12-30 (Dec. 11, 1986). The IBT and Western negotiated, as DOT has suggested, a labor protective provision in the form of a successorship clause. It creates a guarantee of the continuation of all the employees' terms and conditions of employment, including access to and representation before a system board for resolution of, *inter alia*, disciplinary matters and disputes over all working conditions. No voluntarily assumed LPP confers this right. If carriers view successorship provisions as onerous or unlawful, they should not enter into them. That is the carriers' remedy, not judicial intrusion into the substance of private collective bargaining. *See UMWA Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 576 (1982).

No important question of federal law warranting resolution by this Court arises from the decision below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROLAND P. WILDER, JR.
Counsel of Record
WILLIAM LURYE
BAPTISTE & WILDER, P.C.
1919 Pennsylvania Avenue, N.W.
Suite 505
Washington, D.C. 20006
(202) 223-0723

WILMA B. LIEBMAN
25 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 624-7464

Attorneys for
Teamster Respondents

APPENDICES

APPENDICES

APPENDIX A

STATUTORY MATERIAL

Set forth below are Section 2, First and Section 204 of the Railway Labor Act, 45 U.S.C. §§ 152, First and 184.

Section 2, First of the Act states:

> First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Section 204 of the Act states:

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of this subchapter, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised

by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

Such boards of adjustment may be established by agreement between employees and carriers either on any individual carrier, or system, or group of carriers by air and any class or classes of its or their employees; or pending the establishment of a permanent National Board of Adjustment as hereinafter provided. Nothing in this chapter shall prevent said carriers by air, or any class or classes of their employees, both acting through their representatives selected in accordance with provisions of this subchapter, from mutually agreeing to the establishment of a National Board of Adjustment of temporary duration and of similarly limited jurisdiction.

The portions of the Labor-Management Relations Act, as amended, analagously involved in this case are Section 301, 29 U.S.C. § 185.

Section 301 states:

> (a) Suits for violation of contracts between an employer and a labor organization representing employes in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against

the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

APPENDIX B

SEPTEMBER 1, 1984
LETTER OF AGREEMENT

The September 1, 1984 Letter of Agreement between Western and the IBT states:

It is mutually agreed and understood between Western Airlines, Inc. and the International Brotherhood of Teamsters as follows:

In the event of an unfriendly takeover effort, as determined by the International Brotherhood of Teamsters, Western Airlines shall require the merging, consolidating, or acquiring carrier or other entity to assume the obligations of the IBT collective bargaining agreements. Notice of the existence of this Agreement shall be given any airline or other entity involved in a merger, consolidation, or acquisition with or of Western Airlines. Such notice shall be in writing with a copy to the Teamsters Airline Division. Western Airlines shall be liable to the Teamsters Airline Division and to the covered employees for all damages sustained as a result of such failure to require assumption of the terms of this Agreement, and the IBT collective bargaining agreements.

APPENDIX C

The arbitration provisions of the three IBT-Western collective bargaining agreements state in pertinent part:

BOARD OF ARBITRATION

(A) There is hereby established a Board of Arbitration, hereinafter called the Board, for the purpose of adjusting disputes or grievances of any employee or employees or disputes or grievances between the Company and the Union which may arise under the terms of this Agreement and which are properly submitted to it after all steps for settling disputes or grievances, as set forth in Article XV, have been exhausted, provided they are appealed within ten (10) days after last step decision of grievance procedure has been received, and provided that in grievance cases covered under Article XV(C), the Union may extend the time an additional ten (10) days by advising the Company in writing within the original ten-day appeal period.

(B) The Board of Arbitration shall, in part, consist of one (1) member selected by the Union and one (1) selected by the Company. They shall serve until their successors are appointed.

(C) In the event any dispute or grievance is properly appealed to the Board, the Company and Union members of the Board will, upon the request of either party, meet and attempt to select a third member. In case of discharge, such meeting will take place within ten (10) days of the date the case is appealed to the Board. In the event that the parties are unable to agree upon the third member within five (5) days, the parties will jointly request the Federal Mediation and Conciliation Service to provide a list of five (5) neutrals. The parties shall select one (1) neutral by alternately striking names from the list of five (5) neutrals. The order of striking shall be determined by lot for the first case in which a neutral

member is chosen under the provisions hereof and in subsequent cases, the parties shall alternate taking the first strike.

(D) Such Board of Arbitration shall hear and determine the dispute or controversy as promptly as possible and in all events within thirty (30) days and shall issue a finding and award a decision in writing. The decision of the majority of the Arbitration Board shall be final, binding and conclusive to the parties thereto. Such decision shall be within the scope and terms of this Agreement but shall not change any of its terms or conditions. The Board shall answer the question or questions submitted to it. All Arbitration Board hearings will be held at the place of dispute, unless mutually agreed elsewhere.

* * * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 3164

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,
Plaintiff,

v.

REPUBLIC AIRLINES, INC.,
Defendant.

NORTHWEST AIRLINES, INC.,
Defendant-Intervenor.

BENCH OPINION

Plaintiff is the Association of Flight Attendants, a labor organization which represents the flight attendants employed by defendant Republic Airlines, Inc. Republic Airlines, Inc. is a common carrier by air engaged in interstate commerce within the meaning of Section 201 of the Railway Labor Act, 45 U.S.C. § 151, *et seq.* Republic employs approximately 2,400 flight attendants represented by AFA. Labor relations between the parties are governed by the Railway Labor Act.

At all times material to this case, Republic and AFA have been parties to a collective bargaining agreement, the Agreement of 1984, which is attached to the pleadings and made a part of the record in this case. This Agreement states, among other things, that the Company

shall provide the Association with provisions of any legally binding contract for a merger. The description of the possible merger or other transfer of assets or acquisitions or consolidations is set forth in Section 1.D. The Agreement further provides in Section 1.E. that in the event of a merger, acquisition, consolidation or purchase, the Company will provide labor protective provisions for the Republic flight attendants no less favorable than the labor protective provisions specified by the Civil Aeronautics Board in the Allegheny-Mohawk merger.

The Agreement is in full force and effect and provides in other sections, particularly Section 25.A, for a System Board of Adjustment which shall be known as the Republic Airlines Flight Attendant System Board of Adjustment. That Board has been created and it has jurisdiction over what are referred to by the parties and in the cases as minor disputes, that is to say, disputes concerning compliance with the contract provisions, among other things.

Section 25.E. specifically states that the Board shall consider any disputes properly submitted to it by the President of the Union or by designated representatives when such dispute has not been previously settled in accordance with the terms provided in the flight attendants' Agreement.

Exhibit A to the Complaint is a copy of the Allegheny-Mohawk labor protective provisions incorporated by reference into Section 1.E. of the Agreement quoted above.

On January 23, 1986, Republic and Northwest, Inc. entered into an agreement and plan of merger. Exhibit B to the Complaint is a copy of the merger agreement. Republic contends that Section 1.1 of the merger agreement constitutes its compliance with the requirements of the Agreement with the flight attendants to bind any successor to the terms and provisions of the labor agree-

ment between AFA and Republic. AFA contends that at all material times Republic has refused to carry out its obligations under Sections 1.D. and 1.E. of the Agreement.

On February 27, 1986, AFA filed a grievance over Republic's failure under Section 1.D. to bind Northwest to the Agreement and to provide AFA with the terms of the transaction between the carriers carrying out that obligation and under Section 1.E. to provide Allegheny-Mohawk labor protective provisions to the Republic flight attendants. Exhibit F to the Complaint is a copy of the grievance.

On February 27, 1986, AFA submitted this dispute to the Republic flight attendants Board of Adjustment for arbitration and requested that Republic arbitrate the dispute on the expedited basis. Exhibit G is a copy of this submission to the Board.

On March 20, 1986, Republic formally denied the grievance. On March 26, 1986, AFA resubmitted the grievance to the System Board. Republic has taken the position that there is no matter to be submitted to the System Board for arbitration and contends that, among other things, it has complied with the obligations of its labor agreement with the flight attendants, and AFA denies that.

At this point in time, even though there is a merger agreement in effect between Northwest and Republic, Republic continues to be an independent organization bound by its labor agreement with AFA. This dispute is a matter which is properly submitted to the System Board of Adjustment for a determination as to whether or not Republic has literally complied or actually complied with the terms of the Agreement. This is a matter subject to the jurisdiction of the System Board and clearly not a matter for determination by this Court.

This controversy does not, of course, entirely end with this conclusion either factually or legally because Republic contends that intertwined with the issue of contract compliance is the issue of representation and what will occur after the impending merger, assuming now for the purposes of this analysis that the merger will be approved as proposed by Republic and Northwest. In spite of the able representation of counsel, I do not believe that there is at the present time a question of representation after the merger before the court. The only question properly presented by the Complaint and in dispute is one of whether or not the action of Republic, not of Northwest, but of Republic, has been in compliance with the labor agreement between the Association and Republic Airlines. The court should not and need not reach out and consider whether or not the ordering of arbitration will somehow impact the representation of all of the flight attendants after the merger. That is not before me and as the parties so eloquently point out, it is not a matter for the courts in any event. It is perhaps a major dispute and one which is reserved for the National Mediation Board.

No support exists for defendants' argument that arbitration should be denied if this court believes AFA's grievance is without merit. As the Supreme Court recently stated:

> The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.

AT&T Technologies, Inc. v. Communications Workers of America, 106 S.Ct. 1415, 1419 (1986). Therefore, this court has no power to review the merits of AFA's grievance to see if it is substantial enough to "justify" arbitration.

The cases cited by defendants are clearly distinguishable. Most involved the very different issue of whether a dispute is "major" or "minor," a distinction of critical importance in determining such things as the proper forum and whether a court can issue an injunction to preserve the status quo. That distinction can depend on "whether the contention that the contract permits the disputed action is not obviously insubstantial." *Air Line Pilots Ass'n v. Northwest Airlines*, 444 F. Supp. 840-41 (D.Minn. 1977), *aff'd*, 570 F.2d 257 (8th Cir. 1978). *See also Local Lodge No. 1266, IAM v. Panoramic Corp.*, 668 F.2d 265, 284-85 (7th Cir. 1981) (injunction should issue when "the position [the union] will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor"). These cases cannot justify a judicial determination of the merits to decide whether arbitration should be ordered at all. The other cases cited involve attempts by a union to enforce its bargaining agreement after a merger. Since any court action after merger would in effect be a finding that the requesting union is the proper representative, some courts say that would conflict with the National Mediation Board's exclusive jurisdiction over representation disputes so a court should refrain from deciding such cases. *See International Brotherhood of Teamsters v. International Airlines, Inc.*, 717 F.2d 157, 161-62 (5th Cir. 1983). This case, however, presents a pre-merger dispute. AFA is still the representative of Republic's employees, so ordering arbitration will not resolve a representation dispute.

Accordingly, based upon my determination that the material facts with relation to the issue of a dispute

under the contract between and only between AFA and Republic are not in dispute, I do therefore order that summary judgment be granted and that an order be prepared, based upon the oral statement that I have made directing that Republic submit on an expedited basis to the jurisdiction of the System Board of Adjustment to resolve, by issuance of a final and binding award, the parties' dispute over Republic's asserted violations of Section 1.D. and 1.E. of the Agreement. This is the limited relief I grant and the plaintiff will draw an order which so states.

The question of retaining jurisdiction is open. I am not certain it is necessary to retain jurisdiction at this point in time. I want this to be a final order because I realize that either side may want to go to the Court of Appeals. Therefore, I will grant only limited relief. If you think further relief is or should have been granted, you can take that up in the Court of Appeals. My judgment at this point in time is that the Court should grant only such relief as is absolutely necessary to let the parties go forward with expedited arbitration on the limited issues of contract compliance. That will be the order, so please draw it and present it to me.

ENTER:

/s/ William T. Hart
United States District Judge

Dated: June 11, 1986

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 87-5657/5667
D.C. Nos. CV-86-7921-JMI
CV-86-8032
(Central California)

IBTCWHA, LOCAL UNION NO. 2702,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC., *et al.*,
Defendants-Appellees.

AIR TRANSPORT EMPLOYEES,
Plaintiff-Appellant,

v.

WESTERN AIR LINES, INC.,
Defendant-Appellee.

ORDER

Before: GOODWIN, SCHROEDER, and POOLE, Circuit Judges.

The court's opinion in this case filed April 1, 1987 is amended as follows: the phrase beginning on page 11, line 4, of the slip opinion is changed to read "with the merger imminent and one party to the arbitration about to cease its independent existence, both parties assert that the district court will lose jurisdiction to enter an effective arbitration order if the merger takes place as presently planned."

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DELTA AIR LINES, INC., and
WESTERN AIR LINES, INC.,

Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINES DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT AIR TRANSPORT EMPLOYEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUSH *
JESUS E. QUINONEZ

TAYLOR, ROTH & BUSH
A Law Corporation

617 South Olive Street
Suite 1100
Los Angeles, California 90014
(213) 623-8000
Attorneys for Respondent

* Counsel of Record

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether, under the Railway Labor Act, the federal courts have jurisdiction to enforce a successorship clause in a collective bargaining agreement against a contracting party?

2. Whether, under the Railway Labor Act, a carrier may be required to arbitrate a dispute over the meaning and effect of a successor clause which it has bargained for and agreed to include in its collective bargaining agreement?

TABLE OF CONTENTS

		Page
Counterstatement of the Questions Presented		i
Table of Authorities		iii
Statement of the Case		2
Reasons Why the Writ Should Not Be Granted		5
I.	The Court of Appeals' Decision Is Not In Conflict With Any Decisions of This Court or of The Courts of Appeal	5
II.	The Court Correctly Applied Cases Arising Under The National Labor Relations Act	9
Conclusion		11

TABLE OF AUTHORITIES

Page

Cases

Air Line Pilots Association, v. Texas International Airlines, Inc., 656 F.2d 16 (2nd Cir. 1981) 8

ALEA v. Republic Air Lines, 798 F.2d 767 (7th Cir.) *cert. denied,* 107 S.Ct. 458 (1986) 8

Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R., 363 U.S. 528 (1960) 8

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969) 9

Howard Johnson's v. Hotel Employees, 417 U.S. 249 (1974) 5, 7

IAM v. Northeast Airlines, Inc., 536 F.2d 975 (1st Cir.) *cert. denied,* 429 U.S. 961 (1976) 8

IBT v. Texas International Airlines, 717 F.2d 157 (5th Cir. 1983) 8

	Page
Local Executive Board v. Royal Center, Inc., 796 F.2d 1159 (9th Cir. 1986) *cert. denied.*, 107 S.Ct. 881 (1987)	7
Local Lodge No. 1266 v. Panoramic Corp., 669 F.2d 276 (7th Cir. 1981)	7
Nursing Home and Hospital Union v. Sky View Terrace, 759 F.2d 1094 (3rd Cir. 1985)	7
Pan American World Airways v. IBT, 275 F. Supp. 986 (S.D. N.Y. 1967)	10
Teamsters Local 71 v. Akers Motors Lines, Inc., 582 F.2d 1336 (4th Cir. 1978) *cert. denied,* 440 U.S. 929 (1979)	7
United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	7
Wiley and Sons v. Livingston, 376 U.S. 543 (1964)	5-7
Rule	
United States Supreme Court Rule 17	5

No. 86-1855

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DELTA AIR LINES, INC., and
WESTERN AIR LINES, INC.,

Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINES DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,

Respondents.

BRIEF OF RESPONDENT AIR TRANSPORT EMPLOYEES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Air Transport Employees opposes the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit issued in this case on April 1, 1987.

STATEMENT OF THE CASE

Respondent Air Transport Employees ("ATE") represented the craft or class of office, clerical, fleet and passenger service employees at Western Air Lines ("Western"). In 1982 Western asked the ATE for millions of dollars in wage concessions as a response to its severe economic problems. At the same time, due to the precarious economic situation at Western, and in the entire airline industry, ATE sought to obtain additional forms of job security for its members. As a result, in 1982, in exchange for substantial wage concessions, Western agreed to amend the collective bargaining agreement between ATE and Western to include a successorship provision (Section 2(c) and (d) of the Agreement) which bound successors, broadly defined, of Western to apply the collective bargaining agreement to former Western employees after a merger or acquisition. Western agreed to that successorship provision without raising any doubts as to its legality under federal labor law.

On September 9, 1986, Western was purchased by Delta Air Lines, Inc. ("Delta"). The merger of Western and Delta was to take place in two stages. The first was the purchase of stock by Delta, with the maintenance of Western as an independent subsidiary. The second was the operational merger of Western with Delta and the extinguishment of Western as an independent entity. That was scheduled to take place on April 1, 1987.

On November 6, 1986 the ATE filed a grievance with Western alleging a violation of the successorship provision by Western's agreeing to merge with Delta without first obtaining an agreement from Delta to be bound to the terms of the collective bargaining agreement. When Western refused to process the grievance, ATE immediately filed suit in District Court in which it requested that

the District Court find the grievance arbitrable and order Western to arbitrate.

The District Court dismissed ATE's Complaint for lack of jurisdiction, holding that the dispute involved representational matters within the exclusive jurisdiction of the National Mediation Board. (Pet. App. F-1) The ATE immediately appealed and moved for an emergency injunction pending appeal which would have the parties select an arbitrator and schedule an arbitration while the merits were being determined by the Court of Appeals. This motion was granted on March 17, 1987. (Pet. App. D-1) In addition, the Ninth Circuit ordered this case consolidated with *International Brotherhood of Teamsters v. Western Air Lines, et al.*

Western's motion to expedite the appeal, not opposed by the ATE, and the similar motion of the International Brotherhood of Teamsters in the consolidated case, were granted. The ATE then requested that the Court of Appeals, if it found that the dispute over the successorship clause was arbitrable, issue an order enjoining the operational merger of Western and Delta in order to preserve the arbitration tribunal's jurisdiction.

On March 31, 1987 the Court of Appeals reversed the judgment of the District Court and instructed the District Court to enter orders compelling arbitration of the successorship grievance dispute arising under the collective bargaining agreement. In order to preserve the arbitration tribunal's jurisdiction to issue an effective remedy, the Ninth Circuit also enjoined the contemplated merger of Western and Delta pending completion of arbitration proceedings that were scheduled to commence on April 6, 1987 or until Western and Delta agreed "that the result of the arbitration, subject to appropriate judicial review and all valid defenses, would bind the successor corporation." (Pet. App. B-2)

On April 1, 1987, the Ninth Circuit issued its opinion setting forth the reasons for its order. (Pet. App. A-1) In holding that the successorship clause dispute was subject to the mandatory arbitration provisions of the Railway Labor Act ("RLA"), the Court of Appeals stated:

> The unions are not seeking either by this action or by arbitration to obtain recognition by Western of their status as the collective bargaining representatives of Western's employees; the unions already have such recognition. Similarly, the unions are not seeking a determination that they are the collective bargaining representatives of Delta employees. The arbitration is not likely to make a determination that any union or unions will become the representative of Delta employees, given the scope of jurisdiction of the System Adjustment Board. *See* 45 U.S.C. § 184. Instead, the unions seek a determination that Western breached its agreement by agreeing to a merger with an airline that did not agree to voluntarily recognize the unions. Thus, strictly speaking, the actions by these unions are not for resolution of "representation" disputes, but are merely claims that Western has breached its contract.

(Pet. App. A-7)

Just hours after the Ninth Circuit's Order of March 31, 1987, Western and Delta filed an Emergency Application For Stay and For Vacation of Injunction with Associate Justice Sandra Day O'Connor as Circuit Justice for the Ninth Circuit. Before any opposition could be filed by the ATE, Associate Justice O'Connor granted the stay and vacated the Ninth Circuit's injunction.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT OR OF THE COURTS OF APPEAL

Rule 17 of the Rules of the United States Supreme Court provides: "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Rule 17 further provides for the type of questions reviewable by the Court pursuant to a Petition for Writ of Certiorari: conflicts between circuits, between Courts of Appeal and state courts of last resort, and conflicts between lower courts and the decisions, or prospective decisions, of this Court.

Petitioners argue that the writ herein should be granted because the decision of the Ninth Circuit Court of Appeals compelling Western to arbitrate the successorship clause dispute is in conflict with decisions of other circuit courts and with decisions of this Court interpreting the Railway Labor Act. Yet, as explained below, there is no such conflict.

This Court has long recognized the principle that a successorship clause is enforceable against the contracting party that agreed to it.[1] In *Howard Johnson's v. Hotel Employees*, 417 U.S. 249 (1974), this Court, in an 8-1 decision, decided that while under certain circumstances it might be proper to proceed directly against a successor employer, a union has an alternative "realistic" remedy to enforce an alleged breach of a successor

---

[1] This Court has also recognized that such a clause gives certain rights against a successor employer. *See, Wiley and Sons v. Livingston*, 376 U.S. 543 (1964).

clause against the promisor. Indeed, this Court explicitly recognized that the Union in the case before it might have done well to proceed just as the ATE did here:

> The Union apparently did not explore another remedy which might have been available to it prior to the sale, *i.e.*, moving to enjoin the sale to Howard Johnson on the ground that this was a breach by the Grissoms of the successorship clauses in the collective bargaining agreements. *See National Maritime Union v. Commerce Tankers Corp.*, 325 F.Supp. 360 (S.D.N.Y. 1971), vacated 457 F.2d 1127 (CA 2, 1972). The mere existence of the successorship clauses in the bargaining agreements between the Union and the Grissom's, however, cannot bind Howard Johnson either to the substantive terms of the agreements or to the arbitration clauses thereof, absent the continuity required by Wiley, when it is perfectly clear the company refused to assume any obligations under the agreements.

417 U.S. at 258, N.3.

The ability to bind the promisor to its contractual successorship promise is of course rooted in traditional notions of common law contract; but is grounded as well in fundamental principles of federal labor law.

In *Wiley and Sons v. Livingston*, 376 U.S. 543, (1964) this Court observed that while "(e)mployees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership . . ."

> [t]he objectives of national labor policy, reflected in established principles of federal law, *require* that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced

> by some protection to the employees from a sudden change in the employment relationship. *The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by "the relative strength . . . of the contending forces."*

376 U.S. at 549, quoting *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (emphasis added).

This basic labor law policy has generated practical applications by numerous courts which have consistently upheld the validity of successorship clauses and issued injunctions to preserve the status quo pending *arbitration* of the contractual successorship disputes *Local Executive Board v. Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986) *cert. denied*, 107 S.Ct. 881, (1987); *Nursing Home and Hospital Union v. Sky View Terrace*, 759 F.2d 1094 (3rd Cir. 1985); *Local Lodge No. 1266 v. Panoramic Corp.*, 669 F.2d 276 (7th Cir. 1981); *see also, Teamsters Local 71 v. Akers Motors Lines, Inc.*, 582 F.2d 1336 (4th Cir. 1978), *cert. denied*, 440 U.S. 929, (1979) (partial liquidation of business enjoined pending arbitration).

Following these well established guideposts, the ATE negotiated such a clause with Western. The ATE and the 5700 employees it represents not only relied upon the clause and Western's contractual promise to comply with its provisions, but paid millions of dollars in concessions for such a guarantee.

Despite these undisputed facts and the well-established federal labor policy articulated in *Howard Johnson's*, *Wiley*, and the additional cases discusssed above, Western and Delta claim that the Ninth Circuit's decision and injunction are in conflict with decisions of the several Courts of Appeal. (Pet. p. 12) However, the cases relied

upon by Western and Delta, as the court below pointed out:

> generally involve an attempt by a union *after a merger* has taken effect to force a successor employer to be bound by a collective bargaining agreement entered into by the union and predecessor employer.

(Pet. App. A-7, emphasis added) citing *IBT v. Texas International Airlines*, 717 F.2d 157, 158 (5th Cir. 1983); *IAM v. Northeast Airlines, Inc.*, 536 F.2d 975, 976 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976); *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F.2d 16, 17-18 (2nd Cir. 1981).

The primary case relied on by Western, *ALEA v. Republic Air Lines*, 798 F.2d 767 (7th Cir.) *cert. denied*, 107 S.Ct. 458 (1986) is also inapplicable here. In that case, involving the Republic-Northwest merger, the ALEA sought to enjoin the enforceability of a transaction agreement in which Northwest, with whom ALEA had no collective bargaining agreement, had agreed to recognize two competing unions. The Court refused to interfere with the contractual agreement.

Finally, as explained by the court below, it is the function of arbitration tribunals, not the courts, to decide the meaning of collective bargaining agreements and to consider appropriate remedies for violations. In aid of the exclusive jurisdiction of these tribunals to resolve these disputes, it is irrefutable that courts can and should preserve the status quo so that arbitration may proceed as required by the RLA. *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528 (1960).

II. THE COURT CORRECTLY APPLIED CASES ARISING UNDER THE NATIONAL LABOR RELATIONS ACT.

Courts have consistently recognized that it is appropriate to draw from the federal "common" law developed under the National Labor Relations Act ("NLRA") for guidance in interpreting and applying the Railway Labor Act. As this Court so clearly stated in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969):

> To the extent that there exists today any relevant corpus of "national labor policy," it is in the law developed during the more than 30 years of administering our most comprehensive national labor scheme, the National Labor Relations Act. This Act represents the only existing congressional expression as to the permissible bounds of economic combat. It has, moreover, presented problems of federal-state relations analogous to those at bar. The Court has in the past referred to the NLRA for assistance in construing the Railway Labor Act, *see, e.g., Steele v. Louisville & N.R. Co.*, 323 US 192, 200-201, 89 L. Ed. 173, 181, 182, 65 S. Ct. 226 (1944); *Railroad Trainmen v. Toledo, P. & W. R. Co.*, 321 US 50, 61, n. 18, 88 L. Ed. 534, 541, 64 S. Ct. 431, 150 ALR 810 (1944), and we do so again here. Indeed, even if we were to revive the "common law" of labor relations, the common law has always been dynamic and adaptable to changing times, and we would today look to these legislatively based principles for guidance. *Cf. Textile Workers v. Lincoln Mills*, 353 US 448, 456-457, 1 L. Ed. 2d 972, 980, 77 S. Ct. 912 (1957).

394 U.S. at 383.

As one other court has explained, discussions of the National Labor Relations Board and the Courts interpreting and applying the NLRA "offer a cogent analogy in the solution of similar problems arising under the Railway Labor Act and the courts have frequently drawn on the NLRA for guidance" in similar situations presented under the RLA. *Pan American World Airways v. IBT,* 275 F. Supp. 986, 997-98 (S.D. N.Y. 1967).

Thus, the Court below correctly applied cases which have arisen under the NLRA. This is especially true where Petitioners, as they are here, were unable to provide the Court of Appeals with any appellate decisions holding that successorship clauses are unenforceable under the RLA, and where nothing in the statutory language compels a different result.

CONCLUSION

Since the decision of the Ninth Circuit Court of Appeals issued in this matter was not in conflict with the decisions of other courts of appeal or with Federal labor policy as applied by this Court, the petition for a writ of certiorari should be denied. In addition, by virtue of Associate Justice O'Connor's Stay of the Ninth Circuit decision and injunction the operational merger of Delta and Western occurred on April 1, 1987 and Western ceased to exist as a corporate entity. The effect, if any, of this develpment should be determined by the Courts below prior to review by this Court.

Respectfully submitted,

ROBERT A. BUSH
Counsel of Record
JESUS E. QUINONEZ

TAYLOR, ROTH & BUSH
A Law Corporation

Attorneys for Respondent
AIR TRANSPORT EMPLOYEES

No. 86-1855 (4)

Supreme Court, U.S.
FILED
SEP 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DELTA AIR LINES, INC. and
WESTERN AIR LINES, INC.,

Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONERS

WILLIAM J. KILBERG
Counsel of Record
SCOTT A. KRUSE
H. JOSEPH GORE
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

JEFFERSON D. KIRBY, III
MICHAEL H. CAMPBELL
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the
Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

JAMES W. CALLISON
ROBERT S. HARKEY
WALTER A. BRILL
Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta Int'l
Airport
Atlanta, Georgia 30320
(404) 765-2387

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

SUPPLEMENTAL BRIEF FOR PETITIONERS 1

APPENDICES

A. Decision of the National Mediation Board in *Delta Air Lines, Inc. and Western Air Lines, Inc.*, 14 N.M.B. No. 86 (July 9, 1987) A-1

B. The National Mediation Board's *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 N.M.B. No. 103 (July 31, 1987) B-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1855

DELTA AIR LINES, INC., and WESTERN AIR LINES, INC.,
Petitioners,

vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AIRLINE DIVISION, and LOCAL UNION NO. 2707, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and LOCAL UNION NO. 2747, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and AIR TRANSPORT EMPLOYEES,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

SUPPLEMENTAL BRIEF FOR PETITIONERS

This supplemental brief is submitted by Petitioners to apprise the Court of the following recent actions of the National Mediation Board ("NMB" or "Board"):

1. On July 9, 1987, the Board issued its decision in the Delta Air Lines, Inc./Western Air Lines, Inc. merger case (*In the Matter of the Merger of Delta Air Lines,*

Inc. and Western Air Lines, Inc., 14 N.M.B. No. 86 (1987)) (Appendix A, attached hereto);

2. On July 31, 1987 the Board issued its new *Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry*, 14 N.M.B. No. 103 (1987) (Appendix B, attached hereto).

As noted at page 23 of the Petition for a Writ of Certiorari, on April 20, 1987, Delta invoked the services of the NMB to determine whether the Board's certifications of certain labor organizations as collective bargaining representatives of the employees of various crafts or classes at Western were extinguished or terminated at the time of the merger of Western into Delta on April 1, 1987. In its July 9 decision, the NMB determined that certifications of all of the labor organizations were terminated as of April 1, 1987. (14 N.M.B. at 302, Appendix A-10).

As was also noted at page 23 of the Petition, the NMB had announced that definitive procedures on mergers and acquisitions were being developed. On July 31, 1987, those *Procedures* were issued. While not applicable to this merger, those procedures reconfirm the NMB's commitment to prompt resolution of representation issues resulting from the mergers of air carriers.

In both of these actions, the NMB has demonstrated that:

> the creation, change, and the termination of representation rights are within the province of the Board under the Railway Labor Act. At the same time the airline industry's proper growth and development as an essential component of our Nation's valuable transportation resources should be advanced. There is no conflict in these objectives and the Board intends to carry out its responsibilities through these procedures to afford the

> industry a greater measure of predictability in this important area.

(Appendix B-2). Through these actions the NMB has made clear that "the NMB alone is vested with final decision-making authority over representation issues." (Appendix B-1).

The unions here have sought to compel arbitration over "the creation, change, and termination of representation rights," matters that are reserved exclusively to the NMB. Arbitration in these circumstances is not appropriate, the district court properly dismissed these actions, and the decision of the Ninth Circuit Court of Appeals must be reviewed and reversed.

Respectfully submitted,

WILLIAM J. KILBERG
Counsel of Record
SCOTT A. KRUSE
H. JOSEPH GORE
GIBSON, DUNN & CRUTCHER
Suite 900
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

JEFFERSON D. KIRBY, III
MICHAEL H. CAMPBELL
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the
Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

JAMES W. CALLISON
ROBERT S. HARKEY
WALTER A. BRILL
Law Department
Delta Air Lines, Inc.
Hartsfield Atlanta Int'l
Airport
Atlanta, Georgia 30320
(404) 765-2387

Counsel for Petitioners

APPENDIX

APPENDIX A

NATIONAL MEDIATION BOARD
WASHINGTON, D.C. 20572

In the matter of the merger of

14 NMB No. 86

DELTA AIR LINES, INC.

FILE NO. C-5955

and

WESTERN AIR LINES, INC.

TERMINATION OF CERTIFICATIONS (WESTERN AIR LINES)

July 9, 1987

On April 20, 1987, the National Mediation Board (Board) received a request from Delta Air Lines, Inc. (Delta) invoking the Board's services "to determine whether the Board's certifications of the Western labor organizations as collective bargaining representatives of the various crafts or classes at Western have been extinguished or terminated effective April 1, 1987. Delta's request was made in accordance with *Trans World Airlines/Ozark Air Lines*, 14 NMB 218 (1987).

Review of the Board's records reveals that several labor organizations were certified to represent various crafts or classes at Western Air Lines, Inc. (Western). In R-4995, the Air Transport Employees was certified to represent the craft or class of Office, Clerical, Fleet & Passenger Service Employees. The Association of Flight Attendants was certified to represent the craft or class of Flight Attendants in R-3665. The International Brotherhood of Teamsters was certified to represent the crafts or classes of Instructors (R-4785), Mechanics and Related Employees (R-3951) and Stock Clerks (R-3788). The Air Line Pilots

Association represents the craft or class of Pilots pursuant to voluntary recognition.

On Delta the Pilots are represented by ALPA. The craft or class of Dispatchers is represented by the Professional Airline Flight Control Association pursuant to a certification in R-4254.

The Board, on April 23, 1987, directed Delta and Western to furnish certain information on the present operations of the airlines. Delta and the involved labor organizations submitted responses. Pursuant to the Board's request Delta submitted additional information on May 21, 1987, as well as June 16 and 22, 1987.

ISSUES

The following issues are before the Board:

1) Whether Delta and Western combined to form a single transportation system, for purposes of the Railway Labor Act, on April 1, 1987 and;

2) If a single transportation system was created, what affect if any does this have on the representation certifications of the organizations at Western and when did the affect occur?

PENDING LITIGATION

An issue arose from grievance actions filed by ATE, IBT and AFA prior to April 1, 1987. In those actions the unions sought to compel arbitration of grievances under their labor agreements with Western, alleging breach of successorship clauses in connection with the then-proposed merger of Western into Delta. The unions alleged that Western violated those clauses by failing to secure Delta's agreement to be bound by the unions' contracts after the merger was completed. Western refused to submit to arbitration contending that it might result in a decision on

representation of Delta employees after the merger. Representation matters, Delta asserted, are within the exclusive jurisdiction of the Board.

The unions filed actions in the district court for injunctions to compel arbitration. ATE and the IBT filed such action in the United States District Court for the Central District of California while AFA sought relief in the United States District Court for the District of Columbia. In all instances, the district courts denied the unions the relief requested. However, on appeal, the United States Court of Appeals for the Ninth Circuit, on March 31, 1987, ordered the IBT and Western to "select an arbitrator to decide the merits of the parties' disagreement over the interpretation of their collective bargaining agreement." The merger was also enjoined. *IBT* v. *Western Air Lines, Inc.*, Civil No. 87-5657 (9th Cir., March 17, 1987). A similar ruling regarding Western and ATE was made in *ATE* v. *Western Air Lines, Inc.*, Civil No. 87-5667 (9th Cir. March 17, 1987). AFA unsuccessfully appealed the decision of the District Court to the Circuit for the District of Columbia.

On April 1, 1987, the Honorable Sandra Day O'Connor, the Circuit Justice for the Ninth Circuit, stayed the orders of the Ninth Circuit pending the filing and disposition of a petition for certiorari to review the judgment of the Ninth Circuit. A Petition for Writ of Certiorari was filed by Delta on May 20, 1987.

CONTENTIONS

Delta

Delta contends that Western merged with it on April 1, 1987, and ceased to exist on that date. Therefore, Delta concludes that the certifications of the Western labor organizations were extinguished or terminated as of April 1, 1987.

Air Line Pilots Association (ALPA)

ALPA which represented pilots on both airlines has not taken a position on this matter.

Air Transport Employees (ATE)

ATE contends that before the Board can resolve the question of a merger, the agency must first decide whether it "has exclusive jurisdiction to resolve disputes over the obligations of carriers under a successorship clause." The organization requests that the Board "proceed to order an arbitration to resolve the interpretation of the successorship clause in the ATE-Western agreement." If the Board decides that it does not have the jurisdiction, ATE argues that the Board should state so in a very definitive manner and also state that the application of the successorship clause in the ATE-Western agreement would not impinge on representation matters which are within the exclusive jurisdiction of the Board. ATE asserts that the Board should state that its certification is "in effect" until the successorship question has been resolved through arbitration or an election has been held. Citing *Continental Airlines*, 10 NMB 25 (1982) for the proposition that the Board has permitted the recognition of two contracts and two labor organizations in a single craft or class pending an election, ATE argues that such action would not circumvent any provision of the Act.

International Brotherhood of Teamsters (IBT)

It is the IBT's position that its certifications cannot be terminated because there are outstanding contractual issues which are outcome determinative and the Board should not terminate certifications without an election. The IBT's position is based on two arguments. First, the IBT argues that due process considerations and relevant Board criteria "counsel" against termination of the union's certifications. In support of this argument, the IBT makes the following points:

1. Factual developments after April 1 would be radically different if the adjustment board [system board] proceeding had not been interrupted and the Union had prevailed.

2. Carriers must be made to understand that an operational integration conducted in violation of outstanding contractual obligations will not furnish grounds for termination of existing certifications.

3. It would violate the Union's due process rights for the Board to give conclusive effect to the Carriers' actions that occurred only because of a legal proceeding in which the Union was not allowed to participate.

4. It is wrong to allow actions undertaken under a temporary order to have "decisional significance." On this point, the IBT contends that the Carrier's object in this proceeding is to obtain a determination from the Board that the Union's certifications terminated, effective April 1, 1987, so they can conclude that Western's agreements are extinguished. This will enable them to claim that the Teamsters' legal case has been rendered moot by intervening events, i.e., the Board's decision. Thus, the Ninth Circuit Court of Appeals' judgment and order must be vacated and the case dismissed.

5. Because of the pending litigation, the Board's relevant criteria as developed in

TWA/Ozark cannot be fairly or accurately applied at the present time.

Second, the IBT argues that the Board should not terminate certifications, thereby allowing represented employees to become unrepresented, without first investigating the employees' representation desires. In this case, termination of certificates is inconsistent with the scheme of the Act because it presumes that a majority of employees in the post-merger craft or class reject representation based solely on the fact that a majority of craft or class employees on the acquiring carrier as it existed prior to the merger, have not selected a representative. Because of the unique circumstances of this case, termination of the certification effectively would constitute decertification.

Association of Flight Attendants (AFA)

AFA believes that the Board should rule that "AFA's certificate should be maintained pending final resolution of AFA's successorship claim." The unresolved question of the survivability of the collective bargaining agreement is crucial to any Board determination, it argues.

FINDINGS OF FACT

I.

Delta reports that Western's Federal Aviation Administration (FAA) certificate was surrendered on April 1, and, effective that same day, Delta's certificate was amended to include the former Western operations. Western, according to Delta, ceased to exist as a separate corporate entity when a Certificate of Ownership and Merger was filed with the Secretary of State of Delaware on April 1, 1987.

Delta states that Western is not holding itself out to the public as a single entity. Delta and Western are operating under a single Delta schedule. All Western iden-

tification and logo have been removed from Western aircraft and replaced with Delta's name and logo. Complete repainting of the aircraft will be accomplished by the fourth quarter of 1988. Identification changes were made on all ground equipment and Delta alleges that repainting of such equipment was accomplished by July 1, 1987.

Former Western employees now wear Delta uniforms or identification name tags. The labor relations for Western personnel is handled by Delta's Senior Vice President-Personnel. Western's Vice President-Labor Relations was made Delta's Assistant Vice President-Personnel.

There were no Western advertisements after March 15, 1987. Western's reservation system was merged into Delta's on April 1. No tickets have been issued on Western stock since April 1; all Western ticket stock has been destroyed. Former Western airport signs, city ticket office signs, identification materials in aircraft seat pockets, signs on maintenance and reservations facilities were changed from Western to Delta on or before April 1 or within a few days thereafter. Several Western officers have become officers of Delta and two Western directors have become directors of Delta.

II.

Investigation has revealed the following findings concerning the former Western employees. Delta voluntarily provided Western employees with Labor Protection Provisions (LPPS) "no less favorable" than the *Allegheny-Mohawk* Labor Protective Provisions. Titles for all positions at Western have been changed to coincide with the Delta titles so that the positions held by former Western personnel now are identified by the exact same titles as positions held by all other Delta personnel.

Pilots

Delta's pilots and the former Western pilots have merged seniority lists.

Mechanics and Related Employees

Under Delta's policies with respect to these employees, a seniority list is used only in the event of furloughs or transfers to other stations. For all purposes involving seniority, the employee's date of hire is used.

At Delta's request, the former Western employees and original Delta employees elected committees to negotiate the integration of the seniority lists. On June 17, 1987, the committees reached an agreement on a method for compiling an integrated seniority list. According to Delta, the actual integrated list based upon this agreement "will be compiled in the near future."

Office, Clerical, Fleet & Passenger Service Employees

All ground employees have been integrated and are working under Delta's policies, work rules and operating procedures. Western's general office and flight control functions have been transferred to Atlanta, Georgia, where "the former Western personnel have been consolidated with the original Delta personnel." To the extent that seniority is applicable to agents and clerical personnel, Delta states that such integration "was automatically accomplished" because date of hire is used for all matters governed by seniority.

III.

In reference to the Board's inquiry concerning the status of any grievances filed, Delta states that, on April 1, 1987, it "discontinued" the processing of any grievances with the former Western unions except ALPA. Such actions were based on Delta's interpretation of the *TWA/Ozark* case. Subject to assurances by the Board that such actions would not result in a finding of recognition of the involved unions, Delta states that it will resume processing "so that no employee will be deprived of any rights to which he or she is legally entitled." Delta proposes to process these

grievances in such a way that there will be no recognition of the union for collective bargaining purposes.

Delta will continue system board cases with the same system board procedures in place prior to the merger on the condition that the grievant and the union agree that Delta's actions will not result in any contention that Delta has recognized the union for collective bargaining purposes. The Carrier wants a "specific indication" from the Board that its action will not affect the Board's determination. Delta has notified everyone that it will not take any further action until the Board has ruled on this matter.

Discussion

I.

Pending Litigation

AFA and the IBT request that the Board delay a decision on the matter pending final resolution of the litigation. The Board finds that such a delay in this case would not enhance the Act's purpose of promoting labor stability. Sufficient facts have been presented to warrant determination of the specific issues before this Board.

ATE and AFA have asserted that the Board should state that the certifications are "in effect" pending resolution of the matter in litigation. For reasons stated below on the question of single transportation system, this request is denied.

II.

Single Transportation System

This is a situation where a merger or acquisition is alleged to have occurred and the surviving carrier is contending that a single transportation system exists. The Board in *Trans World Airlines/Ozark Airlines*, 14 NMB 218 (1987), enunciated several factors helpful in determin-

ing whether two carriers' operations have been integrated into a single transportation system:

> [T]he Board looks into such practical considerations as whether a combined schedule is published; how the carrier advertises its services; whether reservation systems are combined; whether tickets are issued on one carrier's stock; if signs, logos and other publicly visible indicia have been changed to indicate only one carrier's existence; whether the process of repainting planes and other equipment, to eliminate indications of separate existence, has been progressed.
>
> Other factors investigated by the Board seek to determine if the carriers have combined their operations from a managerial and labor relations perspective. Here the Board investigates whether labor relations and personnel functions are handled by one carrier; whether there are a common management, common corporate officers and interlocking Boards of Directors; whether there is a combined workforce; and whether separate identities are maintained for corporate and other purposes.[1]

Applying the above factors to the present factual situation, the Board finds that Western's operations have been merged into Delta. As a result of this merger and the foregoing findings, the Board holds that Western's certificates of representation terminated on April 1, 1987. This

---

[1] The Board notes that while these factors are applicable in this instance, they may not be controlling in a particular case arising in the future. In fulfilling its responsibilities under Section 2, Ninth, the Board may "pierce the corporate veil for purposes of rational labor-management relations". *See Republic Airlines, Inc. and Hughes Air Corp.*, 8 NMB 49 (1980), and *Offshore Logistics, Aviation Services Division d/b/a Air Logistics*, 11 NMB 144 (1984).

holding is based on the present facts as revealed during this investigation including Delta's plans to merge the seniority lists for the flight attendants and the mechanics and related employees thereby effectively and completely merging its operations. The labor organizations and Delta are requested to report to this Board any significant departure from Delta's plans to resolve this matter or any significant change in the facts as presented to this Board. Delta is requested to inform the Board within 90 days of the date of this decision of its progress in completely merging the seniority lists for the flight attendants and the mechanics and related employees.

III.

Delta's Position on Processing Grievances

Delta has stated that it has suspended processing of grievances pending "specific indication" from the Board that the Carrier's actions will not affect the Board's determination. The Board is not in the position to provide such "specific indication". The grievance process arises out of contractual rights and, as such, is outside the jurisdiction of this Board. Accordingly, Delta's request for such "specific indication" is denied. The Board hastens to add that this decision cannot be interpreted as inhibiting the processing of grievances.[2]

CONCLUSION

Based on the foregoing and a review of the record before it, the Board finds that Western's certificates of representation terminated on April 1, 1987. ATE, AFA and

---

[2] The Board finds disturbing any actions by the parties in a merger situation that result in withholding vested contractual rights. In this instance, the Board sees no reason why appropriate disclaimers should not effectively protect the rights involved and the processing of grievances should not be delayed further.

the IBT will each have 60 days from the date of this decision to file a representation application on the combined system supported by a minimum 35% showing of interest. Such showing of interest may be supported in part by the dues-checkoff authorizations previously in effect at Western. Delta is requested to inform the Board within 90 days of the date of this decision of its progress in completely merging the seniority lists for the flight attendants and the mechanics and related employees.

By direction of the NATIONAL MEDIATION BOARD.

/s/Charles R. Barnes
Charles R. Barnes
Executive Director

CRB/rwc

APPENDIX B

NATIONAL MEDIATION BOARD
WASHINGTON D.C. 20572

Procedures for Handling Representation Issues Resulting From Mergers, Acquisitions or Consolidations in the Airline Industry	14 NMB NO. 103 FILE NO. C-5956 PROCEDURES July 31, 1987

PREAMBLE

In the *TWA/Ozark* decision, 14 NMB 218 (1987), the Board committed itself to establishing new procedures for handling representation issues resulting from airline mergers, acquisitions or consolidations. The Board stated in *TWA/Ozark* that "[e]xperience has shown that existing procedures are inadequate to provide for a fair and orderly resolution of representation matters put into flux by a merger."

These procedures are issued pursuant to the Board's established authority under Section 2, Ninth, of the Railway Labor Act, 45 U.S.C. §152, Ninth.

The Board will utilize its traditional investigatory procedures to determine the facts relevant to the many variations of mergers and acquisitions. So long as the form and purpose of such mergers and acquisitions are not in derogation of employee rights under Section 2, Ninth, the Board will not inhibit or impede these developments or the full and thorough consideration of the important questions involved. There are factors that will make the Board's role difficult, the competition in the airline industry and the uncertainties of business planning.

The parties must recognize the NMB alone is vested with the final decision-making authority over representation issues. The merging or acquiring carriers are the in-

itiators of the contemplated change and it is their responsibility to keep the NMB fully informed. These carriers will decide the nature and scope of the change and the timing involved. The Board recognizes that consistency in planning, however desirable, may give way to business necessities. The Board's efforts will be advanced by prompt and complete information concerning relevant developments and the reasons involved.

In most cases, the initiating carriers contemplate the creation of a single carrier. This decision, when communicated to the Board in advance of a merger date, will invoke the Board's rules on single carrier status with implications concerning representation rights. The Board has had experience where carriers have merged or attempted to merge and presented the Board with representation issues at a date subsequent to the merger. The difficulties involved with post-merger representation questions are reflected in the Board's decisions.

Mergers that contemplate separate carrier status do not involve the same rules and, in fact, may affect representation rights. Accordingly, the NMB will require information on a continuing basis related to such operations to determine whether the separate status continues in fact.

In summary, the creation, change, and the termination of representation rights are within the province of the Board under the Railway Labor Act. At the same time the airline industry's proper growth and development as an essential component of our Nation's valuable transportation resources should be advanced. There is no conflict in these objectives and the Board intends to carry out its responsibilities through these procedures to afford the industry a greater measure of predictability in this important area.

The Board's principal reliance in the development of these merger procedures has been on the generous response of the industry to a request for guidance in de-

veloping sound, objective procedures for dealing with merger-related representation issues.* These findings are based on a comprehensive review of the carriers' and organizations' submissions, prior Board decisions and experience in recent mergers.

The following procedures shall apply to airline carriers and organizations. The Board anticipates the full cooperation of the carriers and organizations involved.

SUBPART A - GENERAL PROVISIONS

1) DEFINITIONS

a) The term "merger" as used herein shall mean a consolidation, merger, purchase, lease, operating contract or acquisition of control as provided by 49 U.S.C. §1378(b).

b) The term "carrier" means a common carrier by air as defined in Title II, Section 201, of the Railway Labor Act, 45 U.S.C. §181.

c) The term "organization" means a labor organization and representative as provided by Section 1, Sixth, 45 U.S.C. §151, Sixth, and Section 2, Ninth, 45 U.S.C. §152, Ninth of the Act.

2) APPLICABILITY OF THESE PROCEDURES

These procedures, effective August 1, 1987, shall apply to all organizations and air carriers which intend to engage in or may be affected by a merger which has not, as of that date, received final approval by the United States Department of Transportation.

---

* Pursuant to the NOTICE in this matter, 14 NMB 249 (1987), the Board established an industry-wide proceeding. Participants were provided an opportunity to submit suggested procedures and then to comment on the procedures suggested by other participants. Eleven proposals and eight reply comments were received by the Board. A broad diversity of views was represented in these submissions.

SUBPART B - SINGLE TRANSPORTATION SYSTEM

1) FILINGS WITH NMB

The carrier will notify the NMB in writing at the same time it files with the Department of Transportation for approval of its intent to merge. The submission to the NMB shall include a complete copy of the carrier's merger application to the Department of Transportation.

2) MERGER INVESTIGATION

The NMB's investigation shall take the form required by the circumstances such as: interrogatories; document requests; on-site investigations; or hearings. The Board's merger investigation will determine whether the carriers will operate as a single transportation system. Applicable decisions regarding such investigations include but are not limited to *American/AirCal*, 14 NMB 379 (1987); *Delta/Western*, 14 NMB 291 (1987); *TWA/Ozark, supra.; Northwest*, 13 NMB 399 (1986); and *Republic/Hughes Airwest*, 8 NMB 49 (1980).

3) MERGER DECISION: PROSPECTIVE EFFECT

a) After investigation the Board will issue a decision concerning the status of the certifications on the merged carrier. Findings concerning the craft or class lines at the merged carrier may also be appropriate. The Board will endeavor to issue its decision on or before the time of the operational merger.

b) Where the Board finds that the certifications on the acquired carrier should terminate, such termination will be effective on or after the date of the Board decision.

4) REPRESENTATION APPLICATIONS FROM INCUMBENT LABOR ORGANIZATIONS

a) Incumbent organizations on the affected carriers will be allowed, absent unusual or extraordinary

circumstances, sixty days from the above-described decision to file a representation application supported by a showing of interest of no less than 35% of the combined craft or class.

b) Evidence of showing of interest from incumbent organizations on the affected carriers may be comprised of, wholly or in part, authorization cards, dues check-off authorizations or seniority lists with a carrier involved in the merger.

c) All other representation applications will be subject to the standard showing of interest requirements contained in the Board's Regulations at 29 CFR §§1206.2 and 1206.5.

d) Failure to meet the above described 35% showing of interest requirement by an incumbent organization will result in dismissal. Such dismissal or withdrawal of an application will not act to impose the one year election bar contained in the Board's Regulations at 29 CFR §1206.4.

5) ELECTIONS

Elections authorized pursuant to Subpart B will be given priority and progressed expeditiously through the balloting process and the final representation decision.

6) SUBSEQUENT REPORTING TO NMB

The Board may require carriers and organizations to inform it in writing of post-merger developments.

SUBPART C - SEPARATE TRANSPORTATION SYSTEMS

1) FILINGS WITH NMB

The carrier will notify the NMB in writing at the same time it files with the Department of Transportation for approval of its intent to merge. The submission to the

NMB shall include a complete copy of the carrier's merger application to the Department of Transportation.

2) NMB INQUIRY

The Board's inquity will request from the carriers and organizations appropriate information concerning the separate transportation systems.

3) CONTINUING DUTY TO REPORT

The Board may require carriers and organizations to inform it in writing of subsequent developments.

SUBPART D - MERGER OF OPERATIONS AT A LATER DATE

1) FILINGS WITH NMB

Carriers maintaining separate transportation systems, which subsequently seek to complete a merger of operations, shall notify the NMB at the earliest practicable date prior to the operational merger.

2) APPLICABILITY OF SUBPART B

Such cases shall be handled pursuant to the procedures established herein dealing with single carrier status at Subpart B, paragraphs 1-6.

SUBPART E - SUPPLEMENTARY MATTERS

1) CARRIER INVOCATIONS

Consistent with *TWA/Ozark, supra.*, at 14 NMB 241-242, carriers involved in a merger can invoke the Board's services for a determination of the post-merger status of any NMB certifications.

2) COMMENTS FROM INCUMBENT ORGANIZATIONS

Incumbent organizations on the affected carriers may make relevant comments to the NMB in writing concern-

ing the carriers' submissions and any other pertinent matters.

3) DISTRIBUTION OF INFORMATION

Carriers and organizations will provide other participants with copies of each submission to the NMB by verified certificate of simultaneous service signed by counsel.

4) PUBLIC INFORMATION

The information submitted to the Board by carriers and organizations will be public information.

5) ADMINISTRATIVE FILE NUMBERS

a) Representation applications filed by incumbent organizations pursuant to Subpart B, paragraph 4, will be assigned a file number in the MR-series.

b) Carrier invocations of the Board's services pursuant to Subpart E, paragraph 1, will be assigned a file number in the MT-series.

c) All other submissions under these procedures will be assigned a file number in the M-series.

SUBPART F - EFFECT OF PROCEDURES

1) NO IMPACT OF PROCEDURES ON VOLUNTARY RECOGNITION AGREEMENTS OR PROGRESSION OF GRIEVANCES

a) These procedures are not a bar to the effectuation of voluntary recognitions otherwise permissible under the Act. *See, TWA/Ozark,* 14 NMB 218 at 234 (1987); and *Republic Airlines*, 6 NMB 817 (1979).

b) These procedures shall not act to inhibit the processing of pending grievances otherwise permissible under the Act. *See, Delta/Western*, 14 NMB 291 at 302 (1987).

2) NO CHANGE IN EXISTING RIGHTS UNDER THE RAILWAY LABOR ACT

Existing rights under the Railway Labor Act shall not be enhanced or diminished by these procedures. The Board recognizes that when a dispute involves the interpretation or application of an airline collective bargaining agreement, Section 204 of the Railway Labor Act, 45 U.S.C. §184, provides that it be referred to an appropriate adjustment board for resolution through arbitration.

By direction of the NATIONAL MEDIATION BOARD

/s/Charles R. Barnes
Charles R. Barnes
Executive Director

Copies to:

Carriers and Labor Organizations in
the Airline Industry.

CRB/dss